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Supreme Court, U.S.
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Supreme Court of the United States

..... Term, 1960

No. 895

OTIS W. LIVINGSTON, JAMES W. CRAIN, JAMES H. SULLIVAN, J. A. CALHOUN, JR. AND FRANCIS M. PINCKNEY, INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, APPELLANTS;

versus

THE UNITED STATES OF AMERICA

AND

E. I. DU PONT DE NEMOURS AND COMPANY,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	3
State Statutes Involved	4
Questions Presented	5
Statement of the Case	5
The Questions are Substantial	8
Conclusion	15
Appendix	17

CITATIONS

Cases: PAGE

In re: Ruder, 271 U. S. 461 3

Clark v. Poor, 274 U. S. 554 3
Curry v. United States, 314 U. S. 14 .....13, 14

Detroit v. Murray Corporation of America and the United States of America, 355 U. S. 489 .....10, 14
du Pont v. State (1954), 44 Wash. (2d) 339, 267 P. (2d) 667 11

Esso Standard Oil Co. v. Evans, 345 U. S. 495 ..10, 14

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U. S. 95 12

Ken Realty Co. v. Johnson (C. C. A., Ala. 1943), 138 F. (2d) 809 13
Kern-Limerick v. Scurlock, 347 U. S. 110 ..11, 13, 14

Mayo v. Lakeland Highland Canning Co., 309 U. S. 310 9

Pittman v. Home Owners Loan Corporation, 308 U. S. 21 12

Query v. United States, 316 U. S. 486 3

Spector Motor Service v. McLaughlin, 323 U. S. 101 8
State ex rel. Roddey v. Byrnes, 66 S. E. (2d) 33, 219 S. C. 485 4
State of Alabama v. King and Boozer, 314 U. S. 1 ..... 13, 14

Toomer v. Witsell, 334 U. S. 385 .....3, 8

United States v. Allegheny County, 322 U. S. 174 .. 12
United States v. Oregon State Medical Society, 343 U. S. 326 .....9, 11
United States v. United States Gypsum Co., 333 U. S. 364 .....9, 11
United States of America v. Township of Muskegon and Continental Motors, 355 U. S. 484 .....10, 14
United States of America and Borg-Warner Corporation v. City of Detroit, 355 U. S. 466 .....10, 14

CITATIONS—Continued

PAGE

Constitution, statutes, and rules:

U. S. Constitution:
- Article I, Section 8, Clause 18 ..... 3, 12
- Article IV, Section 3, Clause 2 ..... 3, 12
- Article VI, Clause 2 ..... 3, 12
- Fourteenth Amendment:
  - Section 1 ..... 3, 12

South Carolina Constitution:
- Article I:
  - Section 5 ..... 3, 12

28 U. S. C.:
- 1253 2
- 1331 2
- 1332 2
- 1341 ..... 7, 8
- 1345 2
- 2281 2

42 U. S. C.:
- 2061 ..... 13, 14

South Carolina Sales and Use Tax Act of 1951, Act No. 379, of 1951 (1951 (47) 546) 2, 4

Act No. 644, Acts of General Assembly of South Carolina of 1954 (1954 (48) 329):
- Section 15(a) 4
- Section 15(b) 4
- Section 15(c) 4

Title 65, 1952 South Carolina Code of Laws:
- Sections 1351-1480 ..... 2, 4
- Section 1407 4
- Section 1409 4
- Section 1465 8
- Section 1466 8
- Section 1467 8

Federal Rules of Civil Procedure:
- Rule 52 9

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versus

THE UNITED STATES OF AMERICA

AND

E. I. DU PONT DE NEMOURS AND COMPANY, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

I

OPINION OF THE COURT BELOW

The opinion of the three-judge United States District Court for the Eastern District of South Carolina, Columbia Division, is reported at 179 F. Supp. 9 and is found, together with the dissenting opinion, as Appendix I to this statement. The order of the Court dated December 28, 1959, implementing the majority opinion is likewise set out in Appendix II to this statement.

II

JURISDICTION

1. The case below was brought by appellees to secure a temporary restraining order, preliminary injunction and permanent injunction restraining and enjoining the appellants from assessing, levying or collecting South Carolina sales and use taxes against appellee, E. I. du Pont de Nemours and Company, hereinafter referred to as du Pont. A three-judge District Court was convened pursuant to 28 U. S. C., Section 2281 and jurisdiction was invoked under 28 U. S. C., Sections 1331, 1332 and 1345. This appeal is taken from the judgment of the three-judge Court restraining and permanently enjoining the enforcement of the provisions of the South Carolina Sales and Use Tax Act, Act No. 379, Acts of the General Assembly of 1951, now Sections 65-1351 through 65-1480 of the 1952 South Carolina Code of Laws, as amended, on or in respect to tangible personal property purchased, stored, used or consumed by appellee, du Pont, under the written contract between the United States and du Pont. The statute pursuant to which this appeal is brought is 28 U. S. C., Section 1253.

2. The date and time of entry of the judgment sought to be reviewed by this appeal is January 5, 1960. Majority and dissenting opinions were filed November 18, 1959.

Notice of appeal was filed in the United States District Court for the Eastern District of South Carolina, Columbia Division, January 21, 1960. By order entered the 29th day of January, 1960, the time for docketing this appeal was extended to May 1, 1960.

3. Section 1253 of Title 28 U. S. C. confers on this Court jurisdiction of this appeal and reads as follows:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocu-

tory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (June 25, 1948, c. 646, 62 Stat. 926.)

4. The following cases sustain the jurisdiction of this Court:

(a) *In re: Buder*, 271 U. S. 461, 46 S. Ct. 557, 70 L. Ed. 1036.

(b) *Clark v. Poor*, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199.

(c) *Query v. United States*, 316 U. S. 486, 62 S. Ct. 1122, 86 L. Ed. 1616.

(d) *Toomer v. Witsell*, 334 U. S. 385, 68 St. Ct. 1156, 92 L. Ed. 1131.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

(a) Article I, Section 8, Clause 18 of the Constitution of the United States.

(b) Article IV, Section 3, Clause 2 of the Constitution of the United States.

(c) Article VI, Clause 2 of the Constitution of the United States.

(d) Section I of the Fourteenth Amendment to the Constitution of the United States.

(e) Article I, Section 5 of the Constitution of 1895 of the State of South Carolina, which reads as follows:

SECTION 5. Privileges and immunities; protection of laws.

"The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."

STATE STATUTES INVOLVED

The validity of the South Carolina Sales and Use Tax Act of 1951, Act No. 379, Acts of the General Assembly of South Carolina (codified as Sections 65-1351 through 65-1480 of the 1952 South Carolina Code of Laws) and pertinent amendments since its compilation (Sections 15(a), (b) and (c) of Act No. 644, Acts of the General Assembly of 1954) are involved. These statutes provide for a sales tax upon the sale at retail of items of tangible personal property, and a use tax upon the use, storage or consumption of tangible personal property, purchased at retail for use, storage, or consumption in South Carolina. Due to their length, they are not here set out verbatim but are found in Appendix III hereof. It should be pointed out here that the Supreme Court of South Carolina, in the case of *State ex rel. Roddey v. Byrnes*, 66 S. E. (2d) 33, 219 S. C. 485, a suit testing the validity and constitutionality of the South Carolina Sales and Use Tax Act, held that the sales tax was a tax levied upon the privilege of selling at retail measured by the amount of business done. Thus, the tax was on the seller. The Act, relating to the sales tax, until amended effective March 20, 1954, contained a mandatory pass-on provision. After March 20, 1954, the pass-on provisions, by amendment to the appropriate Code Section, 65-1407 of the 1952 South Carolina Code, were permissive in character. Both before and after March 20, 1954, by Section 65-1409 of the 1952 South Carolina Code, it was specifically provided that the provisions of Section 65-1407, just alluded to, shall in no way relieve any person subject to the tax levied by this Article. Thus, pass-on or not, the seller was and is the one to account to South Carolina for the sales tax. The use tax is imposed upon the use, storage and consumption of tangible personal property in South Carolina and the tax is upon the user, storer, or consumer.

Their text, that is, the pertinent South Carolina code provisions, is set forth as Appendix III to this statement.

III

THE QUESTIONS PRESENTED

1. Did the three-judge District Court err in refusing to dismiss the complaint on the grounds, or any one of them, set forth in the defendant's motion to dismiss?

2. Did the three-judge District Court err in enjoining the defendants from exacting South Carolina sales and use taxes from du Pont?

3. Did the three-judge District Court err in holding that du Pont was an agent of the United States in the procurement of and use of items of tangible personal property so as to thereby immunize du Pont from assessment and collection of the South Carolina sales and use taxes?

4. Did the three-judge District Court err in holding that the only profit received by du Pont for its contractual obligations with the United States was the mere sum of $1?

IV

STATEMENT OF THE CASE

This case was heard before a statutory three-judge District Court on the complaint of appellees seeking a preliminary restraining order, and preliminary and permanent injunctions, restraining and enjoining the appellants from assessing, levying, and collecting South Carolina sales and use taxes against du Pont, appellee.

The facts material to the consideration of the questions presented are as follows:

The Atomic Energy Commission, an agency of the United States, entered into a written contract with du Pont to design, construct, and operate a government atomic

project, known as the Savannah River Project, located near Aiken, in the State of South Carolina, for the considerations and benefits expressed in the contract.

After several years of negotiations and discussions between the parties, during which a final determination had been delayed at the request of plaintiff, du Pont, for time to allow for study of the final contract provisions and an analysis of its procurement procedures, the defendants finally notified plaintiff, du Pont, on the 12th day of May, 1958, that the purchases of items of tangible personal property, purchased at retail in South Carolina by du Pont, were subject to the South Carolina sales tax and that items of tangible personal property, purchased at retail outside of South Carolina for use, storage or consumption by du Pont in South Carolina, were subject to South Carolina use taxes. Thereafter, complaint was duly served and filed which, as noted, sought to enjoin and restrain the defendants in assessing, levying or collecting the taxes from plaintiff, du Pont. After duly serving notice of motion to dismiss the action, the same was heard by Honorable George Bell Timmerman, Judge of the United States District Court for the Eastern District of South Carolina, who, on the 6th day of August, 1958, entered an order maintaining the status quo until a final disposition of the case by a three-judge Court. An order was entered constituting a three-judge Court to hear this matter and the same was heard by that Court on the 22nd day of September, 1958. The defendants first presented their motion to dismiss on the grounds that the plaintiffs have a plain, speedy, efficient and exclusive remedy under specific provisions of the South Carolina Sales and Use Tax Act; that the action was prematurely brought due to failure to exhaust the remedies in the State Courts, the South Carolina Supreme Court not having passed upon the legal questions sought to be raised by plaintiffs; that the alleged federal questions sought to be raised

by plaintiffs are frivolous and unsubstantial, having heretofore been settled by the federal courts of last resort contrary to plaintiffs' contentions, and that the Court has no jurisdiction to grant the relief sought by plaintiff being forbidden therefrom by the terms of Section 1341 of Title 28, U. S. C. A. Plaintiffs resisted the motion by denying the contentions of defendants. The Court, having taken this motion under advisement, proceeded, then and there, to hear the case on the merits. The plaintiffs contended that the proposed action by the defendants in assessing the South Carolina sales and use taxes against plaintiff, du Pont, was in violation of the doctrine of implied constitutional immunity and since, as plaintiffs contended that du Pont was agent for the United States in the procurement of the items of tangible personal property involved, consequently, a tax imposed upon plaintiff, du Pont, was a tax against the functions, activities and income of the United States being exercised through du Pont. The position of the defendants is that the taxes in question were sought to be imposed against a private contractor, namely, a corporation organized for private gain and not against the United States; du Pont was not contractually designated as agent for the United States in the purchase, use, storage or consumption of the items of tangible personal property; that such agency designation was an absolute prerequisite to immunization of du Pont from state taxation and that no constitutional provisions would be violated in the assessment of such taxes against du Pont, independent contractor. It was admitted during the trial of this matter that but for constitutional immunity the use tax provisions would, standing alone, sustain the use taxes. (Vol. III, p. 76, Official Record.) Following the filing of majority and dissenting opinions on November 18, 1959, the Court entered an order on January 5, 1960, permanently enjoining

defendants from taking any step in the assessment and collection of the South Carolina sales and use taxes.

V

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The three-judge Court below, by judgment entered January 5, 1960, a copy of which is found in Appendix II. to this statement, decided questions of such substantial nature as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution for the following reasons:

1. The Court below took jurisdiction of this matter and granted the relief sought by plaintiffs when it is forbidden therefrom by the provisions of Title 28, U. S. C., Section 1341, where a plain, speedy and efficient remedy may be had in State Courts under Sections 1465, 1466 and 1467 of Title 65 of the 1952 South Carolina Code of Laws (Appendix III hereof), the plaintiffs having failed to exhaust their remedies in State Courts. *Spector Motor Service v. McLaughlin*, 323 U. S. 101; *Toomer v. Witsell*, 334 U. S. 385. If the State Courts should construe these aforementioned code provisions to permit recovery of interest on sales and use taxes, paid under protest, then, the complete adequacy of the provisions of the South Carolina sales and use tax law, in light of 28 U. S. C. 1341, could not be reasonably questioned, and the extraordinary remedy of injunction could be avoided. 28 U. S. C., 1341 reads:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Thus, the issue involves the substantial question as to the right of the three-judge Court to enjoin the enforcement of South Carolina statutes which have not been con-

strued by State Courts. The proper balance between State and Federal Courts is an issue.

2. The three-judge District Court, by its order of December 28, 1959, has ordered that its opinion of November 18, 1959, constitute formal findings of fact and conclusions of law as provided under Rule 52 of the Federal Rules of Civil Procedure. The appellants urge that the Rule requires that the Court should find the facts specially and state separately its conclusions of law. Where, as here, statements of fact are mingled in the opinion of the Court with arguments and inferences for which there is not sufficient basis either in exhibits or oral testimony, the Rule has not been complied with. *Mayo v. Lakeland Highland Canning Co.*, 309 U. S. 310.

Although the Supreme Court will not ordinarily make findings of fact but will adopt the findings of the Trial Court in a non-jury matter such as here, nevertheless, this Court may reverse a finding of fact where, although there is evidence to support the findings, the reviewing Court, on the entire evidence, is left with a definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 364; *United States v. Oregon State Medical Society*, 343 U. S. 326. The finding of the trial Court that the only consideration flowing to du Pont for its entire undertaking was the nominal sum of $1.00 is clearly contrary to the evidence, including an admission during the course of the proceeding, that du Pont purchased from itself at retail prices, for use in the project, items of tangible personal property of its own manufacture or ownership of a value of $1,378,000.00. (Vol. III, p. 13, Official Record.) The provisions of the contract between the parties, Section 7, Article III, General Statement of Work and Services—contemplate that the contractor (du Pont) be free to furnish materials, machinery, equipment and supplies of its own manufacture or ownership, and it did so.

The Court improperly ignored the fact that consideration might be something besides actual cash when it found, as a fact, that the training and experience du Pont obtained in the scientific field as contractor, for its employees, entirely at government expense, was not realistic consideration. It can only be reasonably concluded that consideration, which is the inducement to a contract—the cause, the motive, the impelling influence—was the advantageous training of du Pont personnel in a manner unattainable by others in the scientific field. A finding to the contrary overlooks the realities, which is to say, that du Pont is not a charitable corporation but, to the contrary, that it is interested in earnings for its stockholders which can be best served by maintaining leadership and skill in the realm of science, the realm it occupies. As a matter of fact, the $1.00 consideration is but a nominal consideration in that it bears no relation to the real value of the contract between the parties.

Thus, there is the substantial question as to the correctness of the findings of the trial Court. If du Pont's role is non-charitable, then, even though the property belongs to the United States, the user of government property (du Pont), from whom appellants seek the taxes, under the decisions in *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; *Detroit v. Murray Corporation of America and the United States of America*, 355 U. S. 489; *United States of America and Borg-Warner Corp. v. City of Detroit*, 355 U. S. 466 and *United States of America v. Township of Muskegon and Continental Motors*, 355 U. S. 484, the taxes would be properly assessable against du Pont, a corporation organized for profit, and a user of government property, the legal incidence of the taxes being not upon the United States but instead upon a privilege being exercised by du Pont in South Carolina.

3. The Court below enjoined the State of South Carolina from assessing and collecting sales and use taxes from

du Pont under the doctrine of implied constitutional immunity, holding that du Pont was an agent of the United States and, as such, clothed with immunity. This finding was despite the fact that the written contract between the United States and du Pont does not make du Pont an agent of the United States for the purchase of items of tangible personal property, such finding of agency necessarily being apart from the specific terms of the contract itself, but instead by implication and, therefore, clearly outside of the scope of the decision in *Kern-Limerick v. Scurlock* (1954), 347 U. S. 110. The contract and other evidence before the Court do not support the findings and demonstrate that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 364, and *United States v. Oregon State Medical Society*, 343 U. S. 326.

As contractor in connection with the Hanford Project of the United States, in the State of Washington, exactly as here, du Pont had declined, for reasons of its own, to be agent of the United States except, as here, for the limited purpose of renting government housing and none other and was, thus, held by the Supreme Court of Washington to be subject to that State's business and occupation taxes. *du Pont v. State* (1954), 44 Wash. (2d) 339, 267 P. (2d) 667.

The Court below found that du Pont here was, in effect, the arm of the United States as the *alter ego* of the Atomic Energy Commission in the procurement, use, storage, or consumption of tangible personal property so as to immunize du Pont. This finding was necessary to the conclusion reached by the Court. Nevertheless, in its opinion, the majority Court concluded:

> "An appropriate order enjoining the defendants from exacting sales and use taxes from the United States, in addition to contributions, already made will be entered."

Thus, the order was to be entered enjoining defendants from exacting sales and use taxes from the United States, against which defendants never, at any time, attempted to remotely intimate they purported to levy any tax.

The order which followed the opinion, Appendix II, implementing the opinion, despite the language of the opinion, quoted *supra*, enjoins and restrains the defendants with respect to du Pont.

These circumstances show that the findings and conclusions should be reviewed and corrected.

4. The question is substantial in that it involves whether the State of South Carolina can assess and collect sales and/or use taxes against du Pont, an independent contractor; not against the United States itself and not against a contractually declared agent of the United Sates, and whether such taxes are, in fact and law, nevertheless, levied against the United States in violation of Article I, Section 8, Clause 18; Article IV, Section 3, Clause 2; Article VI, Clause 2; the Fourteenth Amendment, Section I, of the United States Constitution, and Article I, Section 5 of the Constitution of 1895 of the State of South Carolina.

The order of the Court of December 28, 1959, is bottomed upon the aforementioned clauses of the United States Constitution which are commonly referred to as the "Supremacy Clauses". Under these clauses, Congress is empowered to make all laws necessary and proper for carrying out the powers vested in the United States Government. *Pittman v. Home Owners Loan Corporation*, 308 U. S. 21. This power includes the power to protect instrumentalities which it has lawfully created. *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U. S. 95. The purpose of these clauses is to avoid disparities, confusions and conflicts that would follow if the government's general authority were subject to local controls. *United States v. Allegheny County*, 332 U. S. 174. Nevertheless, mutual immun-

ity from taxation accorded to State and Federal Governments will be given a practical application so as to attain its purpose. It is personal to the government and not transferable to or to be used for special protection of a citizen. *Ken Realty Co. v. Johnson* (C. C. A., Ala. 1943), 138 F. (2d) 809.

In the face of these constitutional provisions, this Court has decided in *State of Alabama v. King and Boozer*, 314 U. S. 1, and *Curry v. United States*, 314 U. S. 14, that these constitutional provisions do not operate to prevent imposition of sales and use taxes against a cost plus a fixed fee contractor, such contractor not being the agent or instrumentality of the United States so as to enjoy immunity from taxation even though, as a result of such taxes, the costs to the government would be increased to that extent. Subsequent to the aforementioned cases, in *Kern-Limerick v. Scurlock* (1954), 347 U. S. 110, which case did not overrule *King and Boozer, supra*, but is distinguishable for the reason that there the contractor, under the specific terms of the contract itself, was made the agent of the United States for the purchase of the property, it was held that such contractual designation of agency operated to give immunity to the contractor upon the theory that to tax the contractor was to tax the United States. Such specific agency designation being absent in the instant matter, this case is controlled by *King and Boozer, supra*, and *Curry v. United States, supra*, which would sustain the taxes sought to be imposed against du Pont, independent contractor. In this connection, Section 2061 of Title 42, U. S. C. (The Atomic Energy Act of 1946) retains to the Atomic Energy Commission the right of inspection by its employees of all the activities of its contractors in producing special nuclear materials. The word **inspection** is employed and not the words **supervision, control** and the like, such as generally enter into agency status. Thus, a finding of an independent

contractor status would comport with the intent of the statuory provision just referred to, that is, Section 2061 of Title 42, U. S. C.

There is involved the substantial question whether, since du Pont was not declared an agent under the contract, unlike in the case of *Kern-Limerick v. Scurlock, supra,* that decision is, nevertheless, controlling or whether, on the other hand, the matter is controlled by *Esso Standard Oil Co. v. Evans; State of Alabama v. King and Boozer; Curry v. United States; Detroit v. Murray Corporation of America and the United States of America; United States of America and Borg-Warner Corporation v. City of Detroit;* and *United States of America v. Township of Muskegon and Continental Motors Corporation,* all *supra,* in which cases the taxes there sought to be imposed were held not to be in violation of the United States Constitutional provisions. Thus, an important question is involved, not only from the standpoint of the litigants in this case, but with respect to all taxing authorities which have sales and use taxes.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted with briefs on the merits and oral argument for the resolution of the questions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the aforegoing jurisdictional statement have been served by depositing the same in the United States mails, with first class postage prepaid, to the following counsel of record:

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On this 27th day of April, 1960.

APPENDIX

INDEX TO APPENDIX

PAGE

Appendix I:

Majority Opinion 19

Minority Opinion 44

Appendix II:

Order of the Court Below 61

Appendix III:

Pertinent Provisions of S. C. Sales and Use Tax Act 64

APPENDIX I

MAJORITY OPINION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

I concur — I dissent

Simon E. Sobeloff, U. S. C. J. — George Bell Timmerman, U. S. D. J.

Civil Action No. AC-174

THE UNITED STATES OF AMERICA
AND
E. I. DU PONT DE NEMOURS AND COMPANY, PLAINTIFFS,
versus
OTIS W. LIVINGSTON, JAMES W. CRAIN, JAMES H. SULLIVAN, J. A. CALHOUN, JR., AND FRANCIS M. PINCKNEY, INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, DEFENDANTS.

Filed
Nov 18, 1959
ERNEST L. ALLEN
C.D.C.U.S.E.D.S.C.

Argued September 22, 1958 — Decided

Before Sobeloff, Chief Judge, Haynsworth, Circuit Judge, and Timmerman, District Judge.

HAYNSWORTH, Circuit Judge:

In this action by the United States and E. I. du Pont de Nemours and Company against the members of the South Carolina Tax Commission, the plaintiffs seek an injunction against the collection of South Carolina sales and use taxes upon the use of purchased materials at the Savannah River Project, a facility of the United States, producing, under the direction of du Pont and the supervision of the Atomic Energy Commission, nuclear and related materials.

I

A preliminary question arises under a motion to dismiss in which the defendants assert that maintenance of the action is prohibited by statute[1] and that, in any event, this court should stay its hand until the legal questions have been settled in the state courts.

It is not contended, however, that the United States is only a nominal plaintiff. From what will later appear, it is the real party in interest. The issue it tenders is not one of interpretation or general application of state laws, but of its own constitutional immunity from state taxation. Such an action in no way involves the evils at which the Act of August 21, 1937 was directed.[2] It is apparent the Congress was concerned with the disparity between the rights of a citizen of a state, whose only means of litigating his disputed state tax liabilities was a suit for refund of prepaid taxes, and those of foreign corporations and nonresidents, doing business within the state and incurring tax obligations, who could obtain in the federal courts equitable relief denied to citizens of the state. No reference was made in the committee reports to actions by the United States seeking protection and recognition of its sovereignty. The administrative and judicial procedures for the adjustment and adjudication of private tax obligations to a state may be quite inappropriate to the resolution of questions of sovereignty and of sovereign immunity; at least, the two kinds of questions hardly may be said to be so comparable that procedural restrictions applicable to adjudication of the one should be held, by implication, to be applicable to the other.

There appears no good reason why the Congress should deny the United States the protection of the equitable powers of her own courts in a situation such as that with which we are now concerned, and it has been generally and

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[1] 28 U. S. C. A., § 1341. "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain speedy and efficient remedy may be had in the courts of such State."

[2] See S. Rep. No. 1035, H. Rep. No. 1503, 75th Congress, 1st Session.

broadly held that it did not do so when it enacted, as an amendment to § 24 of the Judicial Code (former § 41 of Title 28, U. S. C. A.), what is now § 1341 of Title 28, U. S. C. A. *United States v. Woodworth*, 2 Cir., 170 F. (2d) 1019; *Board of Commissioners v. United States*, 10 Cir., 139 F. (2d) 248; *City of Springfield v. United States*, 1 Cir., 99 F. (2d) 860; *United States v. Okaloosa County*, D. C., N. D., Fla., 59 F. Supp. 426.

The old notion that the sovereign is not bound by its legislative restrictions upon the exercise of remedial rights unless the legislative intention that it be so is expressly and clearly stated[3] is greatly reinforced when application of the restriction to the particular action is far from the purpose and general intention of the Congress as disclosed in the reports of its committees. It is further strengthened by the fact that Congress made no provision for the use of the public moneys of the United States for the prepayment of contested state taxes, without which a suit for refund, the usual legal remedy provided by the states, is unavailable. Indeed, it has been held that a state remedy is not "plain, speedy and efficient," as to the United States, if its availability is conditioned upon a prepayment of the tax.[4] *Board of Commissioners v. United States*, 10 Cir., 139 F. (2d) 248; *City of Springfield v. United States*, 1 Cir., 99 F. (2d) 860.

We conclude that 28 U. S. C. A., § 1341 does not deprive this court of jurisdiction of this action by the United States, by which it seeks protection of its sovereign immunity from taxation.

Were the United States seeking to avail itself of an exemption or privilege granted by the state, we might,

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[3] *The Dollar Savings Bank v. United States*, 86 U. S. (19 Wall) 227, 22 L. Ed. 80.

[4] The exclusive remedy, under the laws of South Carolina, is a suit for refund after prepayment, in full, of the tax. The South Carolina Tax Commission, agreeing conditionally to waive its claim of interest and extending certain other considerations in the light of the problems of plaintiffs' officials, refused to waive the procedural requirement of prepayment in full of the tax claimed to be due. The amount of this tax, as of March 31, 1958, exceeded $1,750,000.00. It is not shown that the Atomic Energy Commission had available funds in that amount which it might use for that purpose without impairment of its essential functions, or, indeed, that the Commission had authority to use any appropriated funds for such a purpose.

nevertheless, feel constrained to withhold action until the state courts decided the limits of the state's exclusionary grants. *United States v. City of New York*, 2 Cir., 175 F. (2d) 75. Here the sole question is whether or not the United States is the real purchaser and user of the purchased articles so as to make their purchase and use immune from state taxation. That question arises under the Constitution of the United States and its answer is not dependent upon the resolution of any question of state law. It is our duty to consider the federal question, and there is no basis for a remission of the plaintiffs to the state courts.

The doctrine of abstention does not provide an escape from the duty of decision here. If South Carolina's sales and use tax statutes were subject to an interpretation which, if adopted by the Supreme Court of that State, would avoid the federal constitutional question, or even narrow or circumscribe that federal question, we well might stay our hand. Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. *Harrison v. N. A. A. C. P.*, 360 U. S. 167, 79 S. Ct. 1025, 3 L. Ed. (2d) 1152. The decision in Harrison, however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. *N. A. A. C. P. v. Bennett*, 360 U. S. 471, 79 S. Ct. 1192, 3 L. Ed. (2d) 1375. Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit.

We have here no question of construction of the state statute. The use tax is laid broadly by § 65-1421 upon the "use or other consumption * * * of tangible personal property." The defendants are seeking to collect the tax in obedi-

ence to the direction of § 65-1361.1 [5] which imposes the tax even though the purchaser and user be acting as agent of the United States or its instrumentalities.

There is in the statute a general exemption [6] if imposition of the tax is prohibited by the state or federal constitutions. Legislatures, however, should not be presumed to lightly disregard constitutional limitations. General recognition of constitutional restraint is implicit in statutes which do not express it. Expression of that general recognition does not make ambiguous the statute's explicit command.

We find here no question of the construction of the state statutes. Indeed, the defendants do not suggest that any such question exists. They ask that we remit the parties to the state courts for an adjudication of the federal constitutional question. As we would defer to the state courts in cases involving questions of state law, we must perform our duty of decision in a case in which the only question is federal.

There is another reason that the restrictions of 28 U. S. C. A., § 1341 should be held inapplicable to this case and that the plaintiffs should not be remitted to the state courts. That the state court when ordering a refund of sales and use taxes would include in its judgment interest upon the overpayment, or otherwise compel the allowance and payment of such interest is, at least, doubtful.

In *Paris Mountain Water Co. v. Woodside*, 133 S. C. 383, 131 S. E. 37, the Supreme Court of South Carolina held that interest was allowable upon a refund of an overpayment of taxes and ordered its payment. A three-judge fed-

[5] § 65-1361.1. "Same; purchases at retail for storage, etc. Notwithstanding any other provision of law, sales of any tangible personal property to contractors purchasing such property for use in the performance of contracts and sales of any tangible personal property to contractors purchasing such property either (a) as agents of the United States or its instrumentalities, or (b) for their own account for use in the performance of contracts with the United States or its instrumentalities, are retail sales subject to the tax levied against the vendor as provided by this chapter and are purchases at retail for storage, use or other consumption in this State subject to the tax as provided by this chapter."

[6] Code of Laws of South Carolina, 1952, § 65-1404(1), § 65-1422(2).

eral court later examined the record and the briefs in Paris Mountain Water Co., found that the question had been fully submitted and adjudicated and concluded that the question was settled. *Southern Ry. Co. v. Query*, D. C., E. D., S. C., 21 F. (2d) 333.[7] In February, 1929, however, the Supreme Court of South Carolina held in *Monarch Mills v. South Carolina Tax Commission*, 149 S. C. 219, 146 S. E. 870, that a taxpayer could not recover interest upon refunded income taxes in the absence of specific statutory authorization.

The South Carolina Legislature reacted to the decision in Monarch Mills by promptly passing an act[8] providing for the payment of such interest. It did not enlarge, however, the state's waiver of her immunity or her consent to be sued. Section 65-2662 of the South Carolina Code of 1952 permits actions against the state to recover taxes and penalties, illegally collected. It does not expressly authorize actions for the recovery of accruing interest.

A state's waiver of her immunity from suit need not be as broad as the administrative duty imposed by her statutes upon her officials and agencies. South Carolina's consent to actions for the refund of taxes is strictly construed.[9] In *Argent Lumber Co. v. Query*, 178 S. C. 1, 182 S. E. 93, the Supreme Court of South Carolina recognized that the consent to be sued was more restrictive than the broad administrative duty to refund taxes illegally collected which other statutes imposed upon the Tax Commission.

Shortly before the filing of this action, the Supreme Court of South Carolina refused to allow interest upon a refund of certain license taxes. *Colonial Life & Accident Insurance Co. v. South Carolina Tax Commission*, 233 S. C. 129, 103 S. E. (2d) 908. The statute imposing those license taxes adopted the income tax statute authorizing the payment of interest upon refunds and the separate statute

[7] The Court in Paris Mountain Water Co. was concerned with a refund of *ad volorem* taxes; in Southern Ry. Co., with income taxes. Suits for refund of the two taxes were authorized in the same statutory language, so the decision in Paris Mountain Water Co. controlled the result in Southern Ry. Co. See § 65-2662 of the South Carolina Code of 1952.

[8] Act of March 16, 1929, 36 Stat. 1048, now § 65-330 of the South Carolina Code of 1952.

[9] *Bomar v. City of Spartanburg*, 181 S. C. 453, 187 S. E. 921.

permitting actions for the refund of taxes and penalties.[10] Without explanation, and citing only its 1929 decision in the *Monarch Mills case*, the Supreme Court of South Carolina simply said there was no statute permitting the recovery of interest upon the refund of these license taxes. The question of interest was a very subordinate one in that case. The statute requiring the Tax Commission to pay interest upon refunds was not mentioned in the decree of the lower court nor in the briefs in the Supreme Court. The opinion contains no reference to that statute. Possibly, the statute was overlooked, and there may be other explanation of the holding in that case. Until the Supreme Court of South Carolina again speaks upon the subject, however, its holding is open to the possible interpretation that there has been no waiver of the State's immunity from suit to recover accruing interest upon refundable taxes.

Prior to the decision in the *Colonial Life case*, the Tax Commission had taken the position that interest was not recoverable in an action for refund of taxes. In a letter dated April 22, 1958, written by its General Counsel, the Tax Commission informed the Atomic Energy Commission that interest could not be collected in an action for refund of the very sales and use taxes now in issue.[11] In that letter the Tax Commission stated, "The statute makes no provision for payment of interest where the required taxes are paid under protest and the taxpayer prevails in a suit to recover payment of such taxes." The Tax Commission and its General Counsel certainly knew of § 65-1459 and no explanation of its position comes readily to mind, except that suggested in the language used in Argent Lumber Co. The actual question decided in Argent Lumber Co. is dissimilar to the one with which we are concerned, but it suggests a

[10] Art. 1, § 96(d), of the Act of April 19, 1951, 47 Stat. 656, codified in somewhat different language as § 65-934 of the South Carolina Code of 1952.

[11] The South Carolina Sales and Use Tax Act contains provisions entirely comparable to those applicable to income taxes. § 65-1459 provides for the payment of interest while § 65-1467 permits, as the taxpayer's exclusive remedy, an action for refund of tax, penalty or interest paid, if filed within thirty days after the date of payment under protest. As in the comparable income tax provisions, the allowance of interest upon refunds is not mentioned in the sections relating directly to actions in the courts.

strict interpretation of the waiver of immunity without regard to a broader administrative duty which other statutes impose upon the Tax Commission.

Notwithstanding the fact that its earlier position has now acquired the support of the holding in the *Colonial Life case*, the Tax Commission now argues earnestly and persuasively that the statutes do permit recovery of interest in actions for refund of taxes. When, in 1929, the Legislature made provision for the payment of interest upon refunds of income taxes paid, it is said it was motivated, in part, by the decision of the three judge court in *Southern Railway Co. v. Query*, from which it knew that interest payable only by the grace of the Tax Commission would leave South Carolina's legal remedy plainly inadequate and make available to taxpayers equitable remedies. Finally, they say that if the court is powerless to order the payment of interest as a part of its determination of a refundable overpayment, it may do so by a writ of *mandamus* should the Tax Commission, thereafter, refuse or neglect to pay the interest. *Cf. Argent Lumber Co. v. Query, supra.*

The Tax Commission says that hard work and thorough reconsideration in the office of the Attorney General has led to the change in its official position. We find much force in their present position, were it an open question, but the right to recover interest can hardly be said to have been obvious at the time of filing of this action when (1) the Tax Commission and its General Counsel officially denied existence of the right (2) the decisions of the South Carolina Supreme Court cast grave doubt upon the existence of the right, and (3) the Legislature's failure to specifically mention interest in its consent to be sued opened the statutes to the interpretation the South Carolina Supreme Court may have adopted, that the waiver of immunity is substantively narrower than the statutory right to administrative relief.

It is well settled that a right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the

period during which the taxpayer's money is withheld.[12] Even if existence of the right be merely cast in substantial doubt, the remedy is not plain or adequate.[13] The official position of the Tax Commission at the time of filing of this action and the decision of the Supreme Court of South Carolina in Colonial Life requires us to conclude there is presently grave doubt of the existence of a right to recover interest in such cases and that the legal remedy afforded taxpayers in South Carolina is not plain or adequate.

In the face of such official denials, a taxpayer should not be required to run the risk that the official position might be sustained. If the right to recover interest upon the refund was not obvious to the South Carolina Tax Commission and its General Counsel, this Court can hardly say it must have been obvious to the taxpayer.

South Carolina may allow interest upon refunds of taxes or not as she chooses. If she does not make clear the existence of the right to recover such interest, however, she necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statutes.

The defendants' motion to dismiss will be denied.

II

The defendants also contend this is not a case for a three judge court, a contention which is foreclosed by *Query v. United States*, 316 U. S. 486, 62 S. Ct. 1122, 86 L. Ed. 1616, without regard to the fact that § 65-1361.1 of the South Carolina Code of 1952, if it may be constitutionally applied, warrants the position taken by the defendants and authorizes their conduct.

We come to the merits.

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[12] *Nutt v. Ellerbe*, D. C., E. D. S. C., 56 F. (2d) 1058; *Southern Ry. Co. v. Query*, D. C., E. D., S. C., 21 F. (2d) 333; *Mullaney v. Hess*, 9 Cir., 189 F. (2d) 417; *Southern California Telephone Co. v. Hopkins*, 9 Cir., 13 F. (2d) 814; *Hopkins v. Southern California Telephone Co.*, 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329; *Proctor & Gamble Distributing Co. v. Sherman*, D. C., S. D., N. Y., 2 F. (2d) 165.

[13] *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Township of Hillsborough v. Cromwell*, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358; *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101; *Nutt v. Ellerbe*, D. C., E. D., S. C., 56 F. (2d) 1058; *Southern Ry. Co. v. Query*, D. C., E. D., S. C., 21 F. (2d) 333.

III

The contract between the United States, represented by the Atomic Energy Commission, and du Pont, pursuant to which the Savannah River Plant was designed, constructed and operated, was an extraordinary one. For its better understanding, brief reference to its historical setting is appropriate.

In the early days of the Manhattan District Project, du Pont was called upon to lend its services in the design, construction and operation of the Hanford Engineer Works in the State of Washington. It undertook to do this for a fee of one dollar, and entered upon the work in October 1942. Under duPont's management, the Hanford Engineer Works was constructed and made its contribution to the production of the first atomic weapons. After the cessation of hostilities, however, duPont withdrew from the Hanford contract, and, on September 1, 1946, was replaced by the General Electric Company as the manager of those works. See *E. I. duPont de Nemours & Co. v. State*, 44 Wash. (2d) 339, 267 P. (2d) 667.

The explosion of the Hiroshima and Nagasaki weapons and their demonstration of destructive power, which, until then, was wholly unprecedented, led the Congress to give careful consideration to the needs and responsibilities of the nation for the use, control and development of this new source of energy. The great size of the Manhattan District Project and the apparent remoteness of use of fissionable material for nonmilitary purposes led to the conclusion that private enterprise could not alone accomplish the production of fissionable material and the development and production of new products and processes. The nation's responsibility to insure that this great power of destruction should not be misused also led to the conclusion that a strict governmental monopoly and rigid controls were required. At the same time it was recognized that American industry might make great contribution to the work in contemplation and that governmental authority should be authorized to engage the assistance of private industry and industrial organizations.[1] Thus the Atomic Energy Act of

[1] See S. Rep. No. 1211, 79th Congress, 2nd Session.

1946, after creating the Atomic Energy Commission, to be staffed by civilians, provided in § 4 (60 Staf. 759, 42 USCA 2061) that the Commission, as agent of the United States, should be the owner of all facilities for the production of fissionable material, with certain exceptions immaterial here; the Commission was authorized and directed to produce fissionable materials in the facilities it owned, but was authorized also to contract with others for the production of such materials in the facilities owned by the United States.

In August 1949, the Russians successfully exploded an atomic bomb. This led the Atomic Energy Commission and other officials of the United States to reappraise the position of this nation and, ultimately, to a decision to undertake the development and construction of a thermonuclear weapon. In June, 1950, du Pont was asked to lend its experience, its organization and its service in the design, construction and operation of a new plant which was essential to the new program. Du Pont undertook to do this, again for a fee of one dollar. Du Pont entered upon this work in August 1950 and its president advised its stockholders in October of that year of the new undertaking of their company. He told the stockholders that the work had been undertaken only at the request of the government, because it was said to be of vital importance to the security and defense of the United States. He referred to the withdrawal of the company from the management contract of the Hanford Engineer Works in 1946, because, he said, management had believed that the interest of the company required its concentration during peacetime in its field of chemistry, while the development of nonmilitary uses for atomic energy should be left to those companies whose commercial interest and experience were more closely related to physics. The stockholders were told that the undertaking would require the detachment of many executives and technical employees, whose services were profitable to the company, but that the project was undertaken as the company's contribution to the defense effort, in the light of which it seemed inappropriate that it require a fee for its services.

A tract of some 200,000 acres of land in Aiken, Barnwell and Allendale Counties, South Carolina, was acquired.

Upon this tract nine principal plants were constructed with supporting facilities. One of the nine principal plants, known as the fuel element fabrication plant, alloys, casts, extrudes, machines and treats uranium and other metals and fashions them into precise dimensions for subsequent use in the reactors. A heavy water plant, through processes of extraction and distillation, produces heavy water from river water, heavy water being found in the natural water to the extent of 15 1000ths of one per cent. There are five separate heavy water moderated reactors in which plutonium and other products are produced from the fuel materials. In two chemical processing plants usable and desired products are extracted from materials produced in the reactors.

These plants are supported by administration facilities, maintenance and repair shops, warehouses, health laboratories for the protection of personnel, an electric power system comparable to that of the State of Delaware, a water pumping and distribution system approximating that of the City of Philadelphia, railroads, highways, and a research and development center to aid in the production of the entire Savannah River Plant.

The Savannah River Plant was designed and constructed, and is now operated by du Pont under a contract dated September 30, 1953, but effective as of August 1, 1950, as of which date the work had commenced. The definitive contract replaced an earlier letter contract with substantially similar terms. The contract provides in a very general way for architectural and engineering services, for the construction of unspecified plants and facilities and their subsequent operation, for research and development, and for personnel training programs, all, however, as required by the Commission and subject to its approval. By Article XIII, it was provided that the title "to all materials, tools, machinery, equipment and supplies procured under this contract by the Contractor shall vest in the Government whenever title passes from the vendor * * *," and it requires that all Government property be marked and identified as such. The right of the Government to furnish directly materials and supplies was recognized. Du Pont must

be reimbursed for all of its costs and expenses in connection with the project, for the purpose of which the contract provides for a revolving fund to be deposited by the Government with banks designated as depositaries of public moneys. The balances from time to time in each of those bank accounts, under the contract, are the property of the United States, and the banks are required to treat the deposits as public deposits. Du Pont, however, was to be authorized to draw against such funds in payment of purchases and expenses, subject, of course, to the provision for the Commission's control and supervision. Du Pont was required to maintain accounting records, separate from the records of its own commercial transactions, to reflect its operations of the Savannah River Plant only, and the Commission is given the right to inspect and audit those books and all other activities of du Pont at any time it deemed appropriate. All patents, drawings, designs, specifications and technical data, issued as a result of, or growing out of the work, belong to the United States. In Article XXXIV, recognition is given to the fact that du Pont is to do the work for a fixed fee of one dollar, and that the work entails "unusual and unpredictable hazards," in the light of which the contract provides that the United States shall reimburse du Pont for, indemnify it and hold it harmless against, any loss or expense (including expense of litigation), or damage (including discharge of tort liabilities), despite the fact that the expense, or the loss, may have been occasioned by the fault of du Pont's employees. The only exception is for loss, or expense, caused directly by the bad faith, or misconduct, of one of du Pont's elected general corporate officers acting within the scope of his authority.

These provisions of the contract are sufficient to show that the lengthy document is unusual. It was entered into by a contractor without hope of gain, except the nominal one dollar, payable upon final completion of the contract, but upon whom was imposed no risk of loss. Du Pont was not even required to lend its credit or its funds. That it was contemplated that du Pont would act as the *alter ego* of the Commission is further suggested by the contract requirement that du Pont include in subcontracts a number of

provisions applicable to public contracts. Illustratively, 41 USCA § 22 requires that 'in every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon. * * *"; that du Pont was required to insert that and other public contract requirements into its subcontracts, suggests the parties regarded the subcontracts as ones "entered into * * * by or on behalf of the United States."

The procurement procedures were worked out, pursuant to provisions of the contract, by mutual agreement of the AEC and du Pont. The Purchase Order form provides, as its first term:

> "TITLE—The material to be furnished hereunder is for the benefit of the United States Government and title thereto will pass to the United States Government from Seller upon delivery, subject to subsequent inspection and acceptance of the material by du Pont and the Government; if specifications are not met, material may be returned at Seller's expense."

Other provision of the Purchase Order form make applicable the covenants and conditions governing public contracts to which general reference has been made.

Generally the contract authorizes du Pont to make subcontracts and purchases and changes in subcontracts and purchases involving an expense of less than $10,000.00 without prior consent or Commission approval; otherwise the specific advance approval of the Commission is requisite. In dollar amount almost seventy-five per cent of the purchases have been in the latter category and were made with the prior specific approval of the Commission.

To provide the supervision and control contemplated by the contract, the Commission maintains at the Savannah River Plant a staff of approximately 230 people divided into eight divisions to parallel du Pont's organizational divisions. Each of these divisions works in close collaboration and supervision with its counterpart in the duPont organization.

There was early agreement between the Atomic Energy Commission and the South Carolina Tax Commission that purchases of materials and supplies for the Savannah River Plant were not subject to South Carolina sales or use taxes. The contract between the AEC and duPont assumed such immunity from taxation on both constitutional and statutory grounds, and required duPont to inform AEC of any attempt to levy or collect such taxes and, if directed by AEC, to pay them under protest (presumably, by drawing upon the bank balances of the United States established for the purpose of enabling duPont to pay expenses of the project) and to assign to AEC rights to have such taxes abated or refunded. The agreement of the South Carolina Tax Commission, however, was apparently founded upon the provisions of § 9(b) of the Atomic Energy Act of 1946 (60 Stat. 765), which specifically provided, in its last sentence:

> "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

When that sentence was repealed, the South Carolina Tax Commission took the position that, beginning October 1, 1953, du Pont would be required to pay sales or use taxes upon all such purchases. Subsequently the position of the Tax Commission was extended to include a claim of use tax upon delivery to the Savannah River Plant of materials purchased by the United States for the purpose of use at that plant

It is true that in *Carson v. Roane-Anderson Company*, 342 U. S. 232, 72 S. Ct. 257, 96 L. Ed. 257, a contractor supplying certain municipal services to the AEC at Oak Ridge was held exempt from local taxation upon the basis of the provision of § 9 (b) of the Act as it then existed. This was in recognition of the repeatedly expressed principle that the Congress has the power to extend immunity from taxation beyond the limits of that to be implied from the Supremacy Clause of the Constitution. The court thus did not reach the question of implied constitutional immunity. It

was because of that decision of the Supreme Court that the last sentence of § 9(b) of the Atomic Energy Act of 1946 was repealed. In doing so, however, the Congress did not intend to confer upon the states the power to tax activities of the United States entitled to immunity under the Constitution. It was clearly the intention to withdraw from the Atomic Energy Commission and its activities any immunity from taxation beyond its constitutional immunity, and to leave it, with respect to such taxes, on the same basis as other governmental agencies and activities.[15]

Thus we have for decision the constitutional question

At issue are South Carolina sales taxes upon the purchase from South Carolina vendors of supplies for the Savannah River Plant during the period October 1, 1953—March 20, 1954,[16] the tax amounting to approximately $52,000.00 and use taxes upon purchases from out-of-state vendors during the period October 1, 1953—March 31, 1958, the tax amounting to approximately $1,700,000.00.

The doctrine of mutual immunity of state and of nation from taxation by the other, enunciated by Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, has not lost vitality with age. If, at times, it has seemed that "the line between the taxable and the immune has been drawn by an unsteady hand," [17] the basic principle that the United States, its property, its essential functions and activities are not subjects of taxation by the states has not been questioned in modern times.

The doctrine was born of the necessity of protection of the functions of each sovereignty, operating in the same

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[15] S. Rep. No. 694, 83rd Congress, 1st Session.

[16] Prior to March 20, 1954, the South Carolina Sales Tax Act levied the tax upon the seller, but specifically required that he collect the tax from the purchaser. As of March 20, 1954, an amendment became effective, which repealed the requirement of collection of the tax from the purchaser. On and after March 20, 1954, South Carolina vendors have presumptively paid the tax and there is no question here about sales taxes upon such sales. Prior to March 20, 1954, purchases from South Carolina vendors had been effected free of the sales tax under an exemption certificate of the South Carolina Tax Commission, which obligated the purchaser to pay such sales taxes as may be found to be due.

[17] *United States v. County of Allegheny*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209.

territory, from a frustrating taxing power of the other. Since the principle requires immunity from the economic burden of the other's taxes, it is not surprising that in an earlier year when governments were small and taxes and economics less complex, a concentration upon the economic burden should have led to an extension of the doctrine to persons dealing with the governments. Taxation of salaries of government employees and of the activities of vendors to government of goods and services created an economic burden readily perceived, if imperfectly measured. Carried to its extreme in modern society, however, the logical extension of the doctrine would be ridiculous. Economists may estimate the total tax increment in the cost of a complicated machine or of construction of a building, but an attempt to relieve a purchasing sovereign of the economic burden of all taxes, however remote and indirectly imposed, would not only be impossible of accomplishment, but would seriously disrupt the functions of each of the dual sovereignties. Confinement of the extension was difficult, for distinctions between imposts more or less remote and indirect frequently lacked substance. Furthermore, it was not easy to see why the obligations of a manufacturer to the state and community, whose protection and services he enjoyed, should vary with the fluctuations in the ratio of his sales to the United States to his total sales.

In a series of cases, beginning with *James v. Dravo Contracting Company*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, the extension was withdrawn. There it was held that West Virginia might include in the measure of her gross receipts tax upon a contractor, receipts from the United States for work done in West Virginia. Washington's occupation tax measured by the gross income of a contractor engaged in the construction of Grand Coulee Dam was sustained in *Silas Mason Company v. Tax Commission*, 302 U. S. 186, 58 S. Ct. 233, 82 L. Ed. 187.

Superficially, there is an appearance of difference in the immediacy of the tax between a contractor supplying goods and services for a fixed price and one supplying similar goods and services under an agreement that he will be reimbursed for his direct expense and paid an additional

fee designed to cover his overhead and indirect expense and to allow some profit. Generally, the difference is insubstantial, for the selection of an optional method of price determination does not alter the technical incidence of a tax on the contractor or its substantive relation to the purchaser. In the one case, it is clear that no part of the burden of the tax was absorbed by the contractor, while in the fixed price contract it may be debatable, but that is the limit of the difference. If contracting officers of the United States find good reason to believe that particular goods and services may be acquired more cheaply or more expeditiously under a cost-plus-fee contract than under a fixed price contract, they may, if authorized, elect to determine the price in that manner, but they do not thereby effect any substantial change in the relation between the contractor's taxes and the United States. It is frequently said [18] that Congress has the power to extend the immunity of the United States beyond the constitutional limits, but a contracting officer has no such power, and existence of the immunity should not be made to depend upon the form in which he chooses to cast the contract. Furthermore, a contractor's obligations to his state would not seem to vary with the methods employed to compute his prices.

In *Alabama v. King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3, the Supreme Court recognized that the difference in the two types of contracts was not a distinction upon which the immunity question should turn. The court sustained Alabama's tax upon a sale of lumber to a contractor for use in constructing an army camp under a cost-plus-fee contract. The contract provided that title to materials delivered by the contractor to the job site should pass to the United States after inspection and written acceptance by a contracting officer acting for the United States. Meanwhile, title to materials was in the contractor, who had purchased them on his own credit and who, presumptively, could have diverted them to other purposes. Title to materials rejected

[18] *Carson v. Roane-Anderson Company*, 342 U. S. 232, 72 S. Ct. 257, 96 L. Ed. 257; *United States v. City of Detroit*, 355 U. S. 466, 78 S. Ct. 474, 2 L. Ed. (2d) 424; *City of Detroit v. Murray Corporation*, 355 U. S. 489, 78 S. Ct. 458, 2 L. Ed. (2d) 441.

by the contracting officer would never pass to the United States under the contract. Though this particular lumber had been inspected and accepted prior to its purchase, and title, therefore, vested in the United States upon its delivery to the job site, the Supreme Court recognized that the situation was essentially the same as that considered in *James v. Dravo Contracting Company*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155.

In the companion case, *Curry v. United States*, 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9, the Supreme Court sustained Alabama's use tax upon the same contractor involved in King & Boozer, when he used in the work building materials he had purchased from an out-of-state vendor.

As the Supreme Court demonstrated and emphasized, the purchases with which it was concerned in King & Boozer and in Curry were those of the contractor, not those of the United States. Implicit in the decisions is the assumption that had the purchases been those of the United States, they would have been exempt from Alabama's sales tax, which the vendor was required to collect from the vendee, and from her use tax.

Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546, decided that purchases by a contractor, who had been constituted purchasing agent for the Navy Department in connection with the construction of an ammunition depot, were those of the United States and immune from the Arkansas sales tax. Acting pursuant to the contract, the contractor's purchase orders disclosed that the purchases were for the United States and provided that title to the purchased goods should pass from the vendor to the United States.

In *Kern-Limerick* there was a substantial question of the authority of the contracting officers to constitute the contractor the purchasing agent of the government, but there is no such question here. This appears to be the sort of contract Congress had in contemplation in 1946 when it considered the role of American industry in the nuclear program. There was a background of the experience of the Manhattan District Project which had accomplished its

gigantic task with the aid of private industry enlisted under managerial contracts. Thus, the Congress, insisting that the facilities be owned and controlled by the United States, permitted the AEC to engage the assistance of industry. Had there been no pressure of urgency, the AEC, in time, conceivably could have developed an organization of managerial, technical and administrative competence and experience comparable to that readily available to it in the larger industrial organizations, but Congress gave it the choice. What resulted amounts to a management contract, and there seems no good reason that purchasing authority, subject to the strict controls of AEC, could not be delegated to the managers of the project just as it would have been if they had been employed by AEC individually rather than collectively.

This type of contract, and the substantive relation of the parties, made it all the more appropriate that the contract require that title to all goods and materials purchased should pass directly from the vendors to the United States. du Pont's credit was not to be advanced or risked. Its disclosures in its requests for quotation and its purchase orders that the goods were being procured for the United States, to whom title would directly pass, and its imposition of the terms required of public contracts with the United States, negatived any individual liability of its own.[19] What obligations did arise from the purchase orders were discharged by drawing directly upon public funds.

Nevertheless, it is insisted that du Pont was not the agent of the United States for procurement purposes. This insistence is founded upon the fact that the contract does not apply the word "agent" to du Pont in connection with procurement, but does specifically provide that du Pont, as agent of the United States, may lease government housing and real estate. An agent, however, need not be called by that name to be one. Liabilities of principals and immunities from taxation are not dependent upon the use, or omission, of a magic label. It is clear that du Pont's procurement

[19] See *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546; Restatement, Agency (2d) § 320 (1958).

activities were authorized, and were openly on behalf of the United States, and at the government's expense and risk.

We conclude that du Pont's procurement activities resulted in the sale of goods and services to the United States, that the purchases were those of the United States and immune from ordinary sales and use taxes upon the purchaser or upon the purchasing agent. *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546; *Acco Manufacturing Corporation v. Connelly*, 145 Conn. 161, 140 A. (2d) 479; *United Aircraft Corporation v. Connelly*, 145 Conn. 176, 140 A. (2d) 486; *Tawes v. Aerial Products, Inc.*, 210 Md. 627, 124 A. (2d) 805; *General Motors Corporation v. State Commission of Revenue and Taxation*, 182 Kan. 237, 320 P. (2d) 807; *cf. E. I. duPont de Nemours & Co. v. State*, 44 Wash. (2d) 339, 267 P. (2d) 667.

The Tax Commission contends, however, that South Carolina's use tax is not limited to uses incident to ownership, but reaches transfers of possession independent of the title.[2] They contend that du Pont had a separable beneficial and taxable use of all goods and materials whether procured by it or by AEC, for their use was necessary to du Pont's performance of its contractual obligations. They invoke the theory of *Detroit v. Murray Corporation*, 355 U. S. 489, 78 S. Ct. 458, 2 L. Ed. (2d) 441. That du Pont had a separable and beneficial use of this government property they seek to establish by two separate contentions.

First, they say that, while du Pont's procurement[2] during the period in question resulted in the purchase of goods costing roughly $557,085,000.00, some of those purchased goods costing $1,379,000.00 (less than 25/100ths of one per cent of the total) were commercial products of du Pont. The argument is that du Pont accepted the contract for the purpose of furthering sales of its commercial products, and that its assumed profit upon such sales makes its

[2] The taxable use is defined by § 65-1267 of the South Carolina Code of Laws, 1952, as "* * * the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given, except that it shall not include the sale of that property in the regular course of business."

[2] This does not include materials and fuels supplied by AEC.

use of all other goods for its separable benefit as well as that of the United States.

The contract contemplated that some of du Pont's commercial products would be used, and provided that, in supplying them, du Pont would do so as a subcontractor, not as the prime contractor. The procedure, when products of du Pont's commercial organization were required, was: (1) du Pont submitted to AEC a price proposal, (2) AEC, in addition to all of its other supervision of purchases and their need, solicited bids from others, and (3) thereafter AEC made the decision about the order. AEC awarded to others purchase orders for goods costing $1,112,000.00 upon which du Pont had offered price quotations. In a mammoth operation of the nature of the Savannah River Plant, it would be expected that the du Pont company would be among its suppliers by whomever it was managed. Whether or not du Pont might have supplied precisely the same amount of goods, if another had been the manager, we cannot say, but careful safeguards were employed to assure that du Pont's managerial functions did not influence the procurement of du Pont's products, and the difference, if any, was minuscule in the context of this controversy.

Next, says the Tax Commission, du Pont scientists and technicians are acquiring knowledge and experience which may be of greater value to du Pont in some future year than the knowledge, experience and maturity they would have gained had their previous service to du Pont's ordinary activities, and its profit, not been interrupted. This speculation ignores the history of du Pont's withdrawal in 1946 from the management of the Hanford Engineer Works, its reluctant acceptance of its present commission, and the fact that the work at Savannah River Plant is now, and, in all likelihood, will long remain, a monopoly of government.

There is every indication that du Pont accepted this contract and its obligations out of the high sense of public responsibility, despite deprivation, which its president expressed to its stockholders in 1950.

If the Tax Commission's speculation that du Pont's motivation was not entirely unselfish was accepted, how

ever, the United States is still immune from state taxation. For the possessor of government property to have a separable, taxable use measured by the value of the government property much more is required than would be provided by complete acceptance of the Tax Commission's hypothesis.

The custodian of a federal post office building is paid for the performance of his duties, but his use of the materials he requires in the performance of his housekeeping duties is so completely that of the United States that no one would think of taxing him upon the value of the materials. In each of the Detroit cases,[22] the Supreme Court was concerned with taxation of a completely separate business enterprise which used government property for its purposes of profit and which derived as much advantage from the use as if it had legal title to the property. No such condition is to be found here. The use of the Savannah River Plant and of goods and materials purchased for its operation is so completely that of the United States, that, while one may concede the possibility of advantage to others, those others do not become subject to taxation upon the value of the plant or its purchases when, by contract, and in good conscience without a contract, the United States must pay any tax exacted. In a sense, of course, du Pont may be said to have the use of all of the materials and facilities at the Savannah River Plant, but in the same sense it may be said that the individual members of the AEC have the use of all of the facilities entrusted to their care. See *Avco Manufacturing Corporation v. Connelly*, 145 Conn. 161, 140 A. (2d) 479; *United Aircraft Corporation v. Connelly*, 145 Conn. 176, 140 A. (2d) 486; *General Motors Corporation v. State Commission of Revenue and Taxation*, 182 Kan. 237, 320 P. (2d) 807.

Perfect accommodation of the conflicting interest of the sovereign not to be taxed and of a dual sovereign to exercise its power of taxation cannot be achieved by judicial declaration of constitutional principle. Had AEC employed

[22] *United States v. City of Detroit*, 355 U. S. 466, 78 S. Ct. 474, 2 L. Ed. (2d) 424; *United States v. Township of Muskegon*, 355 U. S. 484, 78 S. Ct. 483, 2 L. Ed. (2d) 424; *City of Detroit v. Murray Corporation*, 355 U. S. 489, 78 S. Ct. 458, 2 L. Ed. (2d) 441.

directly those individuals who, technically may be said to be employees of du Pont, the impact upon the state, local communities and their finances would be the same. That impact is not inconsiderable. Governmental acquisition of large properties and their consequent withdrawal from local taxation creates a burden, sometimes intolerable, which is greatly augmented by an influx of employees of the new enterprise, who, with their families, create new demands for schools and other services provided by the state and its political subdivisions. Congress has not been unaware of that problem, however, and has recognized its obligation of recompense. In § 9(b) of the Atomic Energy Act of 1946,[3] Congress directed:

> "In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. * * *"

Such payments, we are told, are being made. If they are to be increased or diminished, it should not be by a recognition of an absolute power of the recipient to measure and command them.

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[3] 60 Stat. 765, 42 USCA, 2208.

An appropriate order enjoining the defendants from exacting sales and use taxes from the United States, in addition to the contributions already made, will be entered.

A TRUE COPY, ATTEST

ERNEST L. ALLEN
C.U.S.D.C.E.D.S.C.

APPENDIX I

MINORITY OPINION

IN THE UNITED STATES DISRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

Civil Action No. AC-174

The United States of America and E. I. du Pont de Nemours and Company, Plaintiffs

versus

Otis W. Livingston, James W. Crain, James H. Sullivan, J. A. Calhoun, Jr., and Francis M. Pinckney, individually and as constituting the South Carolina Tax Commission, Defendants

On Application for Injunction

Argued September 22, 1958. Decided

Before Sobeloff and Haynsworth, Circuit Judges, and Timmerman, District Judge.

Timmerman, District Judge, dissenting: This is an action by the United States and E. I. du Pont de Nemours and Company (hereinafter called du Pont), as plaintiffs, against the Members of the South Carolina Tax Commission (hereinafter called Tax Commission), both individually and officially, as defendants, to enjoin the collection from du Pont (not the United States) of sales and use taxes imposed by valid Statutes of the State of South Carolina.

There is no contention that the tax statutes are unconsitutional because they apply unequally or discriminatorily to du Pont. The rates and conditions of the relevant tax statutes apply to du Pont just as they apply to all others in like situation. The taxes are imposed for the desirable and lawful purpose of providing and maintaining a system of public education, among the beneficiaries of

which are the thousands of children of du Pont's employees, working in South Carolina on the Savannah River Project.

In considering this case a few fundamentals should be kept in mind. Without them as guides a wrong decision could be easily reached. They are, (a) that the plaintiffs have the burden of proof; (b) that self-serving declarations are not evidence where no opportunity for cross examination is afforded; (c) that information aliunde the record is not proof in the case; (d) that there is no presumption that a State remedy is not plain, speedy and efficient; and (e) that one invoking the jurisdiction of a court of equity must come into court with clean hands.

The first and primary prayer of the complaint is for the Court to hold 'that the South Carolina Sales and Use taxes * * * cannot validly be imposed against the plaintiff du Pont". The basis of this prayer is the fact that the Atomic Energy Commission (hereinafter called AEC), an admitted agency of the United States, entered into a contract with du Pont to design and construct and, after construction, to operate the government project, now commonly referred to as the Savannah River Project, for the considerations and benefits expressed in the contract. In the contract du Pont is referred to both as "Contractor" and as "prime contractor".

Of first consideration is the issue of this Court's jurisdiction. Section 1, Article III, of the Constitution of the United States provides that, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *". Since Congress alone has the power to create inferior Courts, such as this district court, it alone has the power to fix the bounds of their jurisdiction; and it alone may legally change the limits of that jurisdiction from time to time. Congress, acting in fulfillment of this constitutional responsibility, has denied jurisdiction to this Court in this case in these words:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient

remedy may be had in the courts of such State". Section 1341, Title 28, U. S. C. A.

Does State law afford du Pont a plain, speedy and efficient remedy for testing the legality of the taxes imposed on it? If it does, then this Court is denied jurisdiction to grant an injunction as prayed for. The plaintiffs contend that the State does not afford an adequate remedy because, as they argue, it doesn't provide "for the payment of interest upon the amount of the tax so paid in the event that the taxpayer is successful in his suit for recovery of the taxes" (Plaintiffs' brief).

There is nothing in the federal constitution that requires a soveregin state to pay interest, unless it obligates itself to do so; and no constitutionally empowered legislative body, except a State's own legislature, has the power to enact a law requiring a soverign State to pay interest on refunded taxes. The proposition that a taxpayer is not afforded an adequate remedy for testing the validity of a state tax, where the taxpayer is required to pay the tax before instituting proceedings to recover it, and when no provision is made for the payment of interest on the amount refunded, was first advanced by Judge Learned Hand in *Proctor & Gamble v. Sherman et al.*, 2 F (2d) 165 (D. C. N. Y.). See also 289 F. 1013 for background. Section 1341, as quoted above, was not in existence at the time Judge Hand's opinion was rendered. He laid down that doctrine, unsupported by any precedent decision or existing legislation and without constitutional sanction. Judge Hand's opinion is in direct conflict with the opinion in *U. S. v. North Carolina*, 136 U. S. 211, 216, 34 L. Ed. 336, 10 S. Ct. 920, wherein Mr. Justice Gray, speaking for the Court, said, "Interest • • • is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers".

It was agreed by Judge Hand that he had been referred to no decision that sustained his point; and he evidently knew of no case that supported his position, else he would have cited it. It is no justification for the position to say

that "a dollar today is worth more than a dollar next year". That is but a trite saying, a cliche, too unsubstantial to supplant the sovereignty of a sovereign state, if indeed a mere court decision could accomplish that result. Whether or not the district court has jurisdiction of this case must be determined on the basis of the inhibition against jurisdiction found in Section 1341. If the State has provided a plain, speedy and efficient remedy, jurisdiction does not exist in this Court.

It is no answer to the jurisdictional issue to say that the United States is not mentioned in Section 1341 and, therefore, that said Section does not limit or defeat the government's right to avail itself of the district court's jurisdiction. That is a *non sequitur*. The government cannot avail itself of a non-existing jurisdiction, and no one is arguing that the United States cannot avail itself of a jurisdiction that does exist. The Attorney General of the United States cannot invest a court pleasing to him with jurisdiction to hear an issue simply because he wishes to avoid a court that does have jurisdiction. He must take that issue to a court that has jurisdiction to hear it. It isn't the government's right to invoke a jurisdiction that exists, but it is the government's right to invoke a jurisdiction that doesn't exist that is in question. Certainly this case could not have been brought in the original jurisdiction of the Circuit Court of Appeals. The simple reason for that is that Congress has not conferred power on the Circuit Court to hear such cases as a part of its jurisdiction. Congress created the Court of Claims that sits in Washington and defined its jurisdiction. That Court cannot exceed the jurisdiction which Congress intrusted to it even though the Attorney General of the United States might want it to do so. Here we have an Act of Congress that prohibits this Court from doing what the plaintiffs have asked it to do, to-wit: to enjoin the assessment, levy and collection of the State's sale and use taxes, although State law provides a plain, speedy and efficient remedy for determining the validity of such taxes. The issue here is not whether the parties themselves are within the jurisdiction of this Court. It is that this Court doesn't have jurisdiction of the subject mat-

ter because an Act of Congress denies it such jurisdiction. Since the district courts are statutory courts their jurisdictions are established by statute. It makes no difference who may request a district court to do so, it cannot legally go beyond the limits of its jurisdiction as fixed by Congress.

The effect of the majority opinion, if allowed to stand, will be to restrict the sovereignty of the states; it will take away from them the power to determine when they will or will not pay interest on their obligations. The remedy that the State provides for a taxpayer feeling himself aggrieved is in effect this: The taxpayer pays his tax, under protest, before it is in default. He then has thirty days within which to commence an action in the appropriate State Court to recover the tax paid under protest, and thereby to test the validity of the tax. If the tax is held valid, the State retains what was paid and uses it for the purpose for which it was imposed, and the contesting taxpayer by following the State remedy saves penalties and interest that otherwise would be chargeable against him. If the tax is held invalid, the taxpayer is refunded the amount paid with or without interest as the State Court may determine.

If the remedy afforded the taxpayer by the State is given fair consideration, it will lead unerringly to the conclusion that the remedy afforded the taxpayer by the State is both fair and considerate. There is nothing abstruse about the remedy; it is plain enough for the average high school student to understand, and it is quite speedy. If it were speedier, no doubt plaintiffs would now be complaining that it is too speedy. The majority has pointed out no lack of efficiency in the remedy, and there is no legitimate presumption that the remedy is inefficient. The object of the remedy is to determine the validity of the tax. If that object is attained, as undoubtedly can be done under the State procedure, it certainly will not prove its inefficiency. There is no fact established in this record to which the majority can point as establishing the inefficiency of the remedy. Surmise is its only support. Hence I would hold that this Court has no jurisdiction of this case and I would dismiss it. Failing in that, I would stay proceedings in this Court and give the plaintiffs a reasonable time within which to have their cause

heard in the State Court, retaining jurisdiction in the meantime. See: *Leitner Minerals, Inc. v. U. S.*, 352 U. S. 220, 1 L. Ed. (2d) 267, 77 S. Ct. 287; *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U. S. 639, 3 L. Ed. (2d) 562, 79 S. Ct. 455; *George F. Alger Co. et al. v. Peck, Tax Commissioner*, 347 U. S. 984, 98 L. Ed. 1148, 74 S. Ct. 605; and *Shipman v. DuPre et al.*, 339 U. S. 321, 94 L. Ed. 877, 70 S. Ct. 640.

Now, as stated by the majority in their opinion, "we come to the merits".

At the outset, I think it well to call attention to the fact that in another case growing out of the Savannah River Project, in which du Pont was the sole defendant and was represented by the Attorney General of the United States, it was held that du Pont was the prime contractor, that it was bound by the terms of an agreement it had with a subcontractor, and that neither the United States nor the AEC was a necessary party to the action, although the government was obligated by its contract with du Pont to reimburse du Pont for any recovery had against it by the subcontractor. *E. I. du Pont de Nemours and Company v. Lyles and Lang Construction Company*, 219 F. (2d) 328, Cert. denied, 349 U. S. 956, 99 L. Ed. 1280, 75 S. Ct. 882.

The contract between AEC and du Pont was entered into September 30, 1953, and made retroactively effective August 1, 1950. Thus du Pont was made the prime contractor and it was engaged in designing and constructing the Savannah River Project from the beginning, or for three years and two months before the final contract was executed. The Plaintiffs claim that du Pont's operations during the first three years and two months were pursuant to a "Letter Contract".

Section 1 of Article II of the 1953 contract provides in part as follows:

> "The **Contractor is** requested and **authorized,** subject to the approval of the Commission as hereinafter set forth, **to furnish or procure** in the shortest practicable time **the labor, materials, tools, machinery, equipment, facilities, supplies** and services (not furnished or

procured by the Government) and **to do all things which in the Contractor's judgment are necessary or desirable** for the development, design, construction, installation and operation of new production facilities * * *." (Emphasis added.)

Section 2 of the same Article provides in part:

"The **new production facilities** contemplated hereunder **will involve certain technical developments which go beyond any experience which has been had** at the Hanford Project or any other installation of the Commission and the attainment by the Contractor of the objectives of the project cannot be assured. The Contractor undertakes to use all reasonable efforts to carry out the project and to attain the objectives thereof * * *." (Emphasis added.)

Section 3 of Article III provides:

"**The Contractor shall furnish or procure architect-engineer and other services incident to design, procurement of materials and equipment, inspection and supervision of the construction of the Plants.**" (Emphasis added.)

There are other provisions in the contract that need not be quoted here but which, when considered with those already cited, clearly indicate the relationship between du Pont and the government. All of them point unerringly to the one conclusion, that du Pont was and is an independent contractor on the Savannah River Project.

I do not agree with the majority that du Pont entered into the contract here in question "without hope of gain, except the nominal one dollar payable on final completion of the contract". This in effect says that the majority believes that du Pont accepted the prime contractorship of an enterprise that has already cost well over a billion dollars and would keep it engaged for more than eight years for the pittance of twelve and a half cents per year or less.

There is no contention that du Pont is an eleemosynary corporation. It would be impossible for it to possess the immense wealth which it does possess doing what it is now

claimed it has been doing for the past eight years—working for nothing. What right has the management of a highly competitive business corporation to use its skills and managerial abilities for the sole benefit of others without pay? By way of explanation of this unusual conduct it is claimed that the President of du Pont wrote a letter to the stockholders, but there is no proof that the stockholders were consulted in an effective way and that they agreed for du Pont to do what is now claimed it has been doing for eight years—working for nothing. Did the stockholders agree to forego dividends for the benefit of the Government? If so, where is the proof? All that I have seen in the record bearing directly on this point is what purports to be a copy of a letter written by the President of du Pont "To the Stockholders of E. I. du Pont de Nemours & Company", under date October 18, 1950, and without any addresses given. This circular letter by Mr. Greenwalt, the President of du Pont, didn't ask the stockholders, it told them that "the du Pont Company has executed a Letter Contract covering the design, construction and operation of new production facilities for atomic materials".

It is the duty of a Court to take into consideration the reasonableness of any statement or contention made by a litigant, or in its behalf. It is conceded that du Pont sold to itself as contractor a little less than one and a half million dollars of its products at retail prices. No one has testified in open court under oath what rightfully was the producer's profit, what rightfully was the middleman's profit, or what rightfully was the retailer's profit; nor do we know the sum of those profits. Whatever they amounted to in the aggregate, du Pont got. Did the total amount to three-fourths of a million dollars or to half a million dollars? Whatever the amount, plaintiffs claim it is inconsequential. Had du Pont produced the facts, the Court would not now be left to conjecture. Moreover, nothing has been told the Court about profits on products purchased from other large corporations in which du Pont may have held large blocks of stock, as for instance, the General Motors Corporation.

The contract obligates the government to reimburse du Pont for an undisclosed percentage of du Pont's overhead.

The amount to be paid du Pont was to be calculated on the basis of an agreed formula. The Court was shown a copy of the formula after all essentials of the formula had been x'd out. In that form it does not give information; it conceals information. All the Court has is the plaintiffs' contention that the amount contributed by the government to du Pont's overhead is a top secret.

Section 2, Article XVI of the contract also obligates the government to make another contribution to du Pont. It is to pay du Pont for all extra compensation, awarded as incentive pay to the du Pont employees assigned to the Savannah River Project. As stated in this Section "• • • all • • • extra compensation hereunder shall be in the form of common stock of E. I. du Pont de Nemours and Company acquired by the Contractor [du Pont], or in the form of cash to be invested in new common stock of E. I. du Pont de Nemours and Company issued by the Contractor [du Pont] directly to the employees, or in the form of cash, or in two or more of such forms; • • •"

No value is fixed for the du Pont stock given to the employees as extra compensation. Since du Pont was the owner of the stock awarded and was reimbursed for it, shouldn't it be known what du Pont received for it? How else can it be known whether a profit was or was not made. I have seen no facts and I have heard none testified to that would form the basis of an opinion as to whether du Pont has or has not profited by the sale of its stock to the government, or in effect to the government. The plaintiffs have the burden of proof, and there is no presumption that what they contend is true in the absence of proof.

It is hard to know without a complete disclosure of all the facts what profit du Pont will derive out of the Savannah River Project, but we do know enough to know that it has amounted to, or will amount to far more than the plaintiffs admit. We also know, historically speaking, that those who were the first to learn the potentials of petroleum were the ones who first grew immensely wealthy in the development of them. Will not the same hold true in the development of the vast potentials of the atom for peace time uses?

Upon the hearing of this case, the suggestion that du Pont may have been the recipient of a wide and valuable atomic experience in designing, constructing and operating the Savannah River Project was made light of by plaintiffs. The same notion appears in the majority opinion. In Section 1, Article II of the Contract, cited above, it was agreed that, "The Contractor [du Pont] is * * * authorized [at public expense] * * * to furnish or procure in the shortest practicable time the labor, materials, tools, machinery equipment, facilities, supplies and services * * * and **to do all things which in the Contractor's [du Pont's] judgment are necessary or desirable for the development, design, construction, installation, and operation of new production facilities** * * *". (Emphasis added.) Why all the hurry to develop, construct and operate **new production facilities?** Has all the propaganda coming out of Washington about the peace time uses of the atom been a hoax? I think not. What were the uses to which petroleum was put in the 1880's, and what now?

Sections 1 and 2, Article II of the Contract clearly indicate the purpose of the Savannah River Project to be the development of production facilities theretofore unknown in the atomic energy field. The Savannah River Project was to become the last word in that field, and as we are now led to believe it is the last word in the atomic field. du Pont knows the process from a to z, but its competitors do not. How any one, even a rabid partisan, could actually believe that such knowledge and experience as du Pont gained on the Savannah River Project has little or no material value is hard to understand.

The taxes which plaintiffs seek to have declared not legally assessable against du Pont are South Carolina sales and use-taxes which were imposed by appropriate legislation, Act No. 379, Acts of the General Assembly of South Carolina, approved April 19, 1951. This legislation is incorporated in the 1952 South Carolina Code of Laws, Chapter 15, Title 65. Pertinent amendments to the code sections since its codification are shown in the Supplement to the 1952 South Carolina Code of Laws.

One of the periods involved in this action is the period from July 1, 1951 (effective date of the South Carolina Sales and Use Tax Act) to October 1, 1953, when Congress deleted the last sentence of Section 9(b) of the Atomic Energy Act of 1946 (42 USCA 1809(b)). This provision was commonly referred to as "the activities clause". It expressly exempted from state, county or municipal taxation the AEC and its property, activities and income. While this provision was a part of the Atomic Energy Act, the United States Supreme Court, in 1952, decided the case of *Carson v. Roane-Anderson*, 342 U. S. 232, 72 S. Ct. 257, 96 L. Ed. 257, in which it was held that the State of Tennessee could not collect sales or use taxes from management contractors nor their direct suppliers on items of tangible personal property in the performance of atomic energy functions by reason of Section 9(b) of the Atomic Energy Act. Under the South Carolina Sales and Use Tax Act (Section 65-1421 of the 1952 South Carolina Code of Laws), the use tax is imposed upon the user, storer or consumer of tangible personal property purchased at retail, which, in this case, is du Pont. The decision in *Carson v. Roane-Anderson*, measured in the light of the aforementioned section of the South Carolina Use Tax Act, would preclude assessment and collection of use taxes during the period from the enactment of the South Carolina Sales and Use Tax Act in July, 1951 to October 1, 1953, that is to say during the existence of Section 9(b) of the Atomic Energy Act, "activities" being therein held to be broad enough to cover the use tax during that period.

As regards the sales tax during the aforementioned period, July 1, 1951, to October 1, 1953, the provisions of the South Carolina Sales Tax Act must be regarded as having been considered by the South Carolina Supreme Court in *State v. Byrnes*, 219 S. C. 485, 66 S. E. (2d) 33, where the sales tax was held to be a tax on the privilege of selling at retail measured by the amount of business done. The Sales Tax Act, therefore, imposed the sales tax on the seller of the goods. The Sales Tax Act has other provisions not passed upon by the South Carolina Supreme Court that must be considered along with the above principle. One of

these provisions, as contained in the South Carolina statute during the existence of Section 9(b) of the Atomic Energy Act, was Section 65-1407 of the 1952 South Carolina Code of Laws, which required the seller to add to the purchase price an amount sufficient to make the seller whole by reason of his liability and to pass the same on to the purchaser. Equally important, however, in relation to this aspect are the provisions of Section 65-1409 of the 1952 South Carolina Code of Laws which specifically provide that the provisions of Section 65-1407 of the 1952 South Carolina Code of Laws shall, in no wise, relieve the seller from the tax imposed by the statute either because of inability, impracticability, refusal or failure to add to the sales price and to collect same from the purchaser the amounts provided therein. Therefore, the South Carolina sales tax is one imposed on the seller and being such is not a tax on the "activity" of the AEC. Of course, for the period after March 20, 1954, when the South Carolina Legislature amended the Sales Tax Act so as to make the pass-on provisions permissive instead of mandatory, the plaintiffs are not contesting the liability for sales taxes thereafter, that is, after March 20, 1954 (Allegation 6 of the complaint). On the other hand, plaintiffs are contesting use taxes for the entire period.

One aspect of this case, injected by plaintiffs, has to do with the question of implied constitutional immunity from state taxation. Plaintiffs admitted, at the trial of this case, that except for alleged implied constitutional immunity the South Carolina Sales and Use Tax Act would be sufficient for the imposition and collection of those taxes. The plaintiffs contend that such doctrine extends to cover the purchases of tangible personal property by du Pont and the use of such items by du Pont. The defendants contend that such is not the case.

A review of the cases dealing with the implied constitutional immunity theory reflects that the subject has been treated as it relates specifically to the realm of sales and use taxes. The United States Supreme Court in *Alabama v. King and Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3, held that the application of the Alabama sales tax to sales of tangible personal property, made to a contractor with

the United States, infringed no constitutional inhibitions against State taxation of the United States. In the companion case of *Curry v. United States*, 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9, the United States Supreme Court held the Alabama use tax to be constitutionally unobjectionable. In the later case of *Kern-Limerick v. Scurlock*, 347 U. S. 110, 98 L. Ed. 546, 74 S. Ct. 403, the United States Supreme Court found that the contractors there, under the express terms of the contracts, were purchasing agents for the government and differentiated the case of *Alabama v. King and Boozer* in that important and fundamental particular. A relevant part of the contract considered in *Kern-Limerick v. Scurlock* reads: "The Contractor shall act as purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price". Being expressly designated as agents of the government for the specific purpose of buying items of tangible personal property, the legal incidence of the tax fell directly upon the United States, and thus infringed the government's constitutional immunity from taxation. In the case of *Alabama v. King and Boozer*, there was no expressed authority for the contractor to act as an agent of the United States, and the legal incidence of the taxes fell upon the contractor and not upon the United States. The same is true in *Curry v. United States*.

As has been shown hereinbefore du Pont has not been acting as an agent of the government, but on the contrary as an independent contractor in designing, constructing and operating the Savannah River Project.

In considering plaintiffs' claim that the doctrine of implied constitutional immunity from state taxation is applicable here, reference must be had to the contract to ascertain du Pont's status. It expressly made du Pont agent of the government for one purpose and one purpose alone, that is, for the purpose of leasing government owned houses, stores and other buildings. That was the very thing done in the contract between du Pont and the United States respecting the **Hanford Project** of the AEC, as shown in the case of *E. I. Du Pont de Nemours & Co., Inc. v. State of Washington* (1954), 267 P. 697, where the Court held

du Pont *to* be **an independent contractor** and **not an agent of the United States.** The United States intervened in that case but there was no appeal. Nothing could be clearer than that the contract did not create du Pont an agent to purchase tangible personal property for the government, although the minds of the contracting parties adverted to agency for the purpose of leasing government property for which du Pont was made an agent. Since the contract does not constitute du Pont an agent of the government for the purchase of tangible personal property, the principles laid down in *Kern-Limerick v. Scurlock* would not be met, so as to provide tax immunity to du Pont. That decision by no means holds that agency is to be implied between the parties but rather that the contract to which the parties have agreed shall govern.

The principal items of taxation at issue in this case relate to use taxes, as most of the items of tangible personal property were purchased outside of South Carolina and were brought or caused to be brought into South Carolina for use, storage or consumption by du Pont. The South Carolina Use Tax Act imposes a tax in such circumstances. Section 65-1421 of the 1952 South Carolina Code of Laws; *State v. Burnes*, 219 S. C. 485, 66 S. E. (2d) 33.

The plaintiffs contend that du Pont is not liable for use taxes because title to most of the tangible personal property vested in the United States at points outside of South Carolina and was thereby insulated from state taxation. The defendants, on the other hand, rely on the provisions of the South Carolina Use Tax Act particularly the statutory definition of the word "use" and contend that du Pont is liable for the use taxes under a proper construction and application of the South Carolina statutes dealing therewith. Section 65-1367 of the South Carolina Code of Laws defines "use" in part as the "exercise of any right or power over tangible personal property incident to the ownership of that property". If the statute had stopped right there the position of the plaintiffs might have some merit. However, the statute does not stop there but rather it has another complete clause disjoined from the foregoing quoted portion by the word "or" reading, "or by any trans-

action in which possession is given". Thus, "possession" is made the key word. Here du Pont had possession of a large amount of tangible personal property, which it necessarily used in carrying out its obligations to the government, as prime contractor, on the Savannah River Project. Certainly the tangible personal property was used by du Pont, even though it was apart from ownership, precisely what the statute contemplates. The South Carolina statute is different in that particular from the Connecticut and Kansas statutes which were considered in the cases of *Arco Manufacturing Company v. Connelly*, 19 Conn. Sup. 323, 113 A. (2d) 364, and *General Motors Corporation v. State Commission of Revenue and Taxation*, 182 Kansas 237, 320 P. (2d) 807. The holdings in those cases were predicated on the language of the use tax statutes involved.

The March 3, 1958, decisions of the United States Supreme Court in *Detroit v. Murray Corporation of America*, 355 U. S. 489, 2 L. Ed. (2d) 460, 78 S. Ct. 458, *United States of America and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466, 2 L. Ed. (2d) 424, 78 S. Ct. 474, and *United States of America v. Township of Muskegon and Continental Motors Corporation*, 355 U. S. 484, 2 L. Ed. (2d) 436, 78 S. Ct. 484, support the validity of the South Carolina use tax.

The last cited cases should settle the use tax issue once and for all. It is quite manifest from what is stated in those cases that our Supreme Court does not intend, by strained constitutional construction, to restore to the Atomic Energy Act what was deleted therefrom by the Congress of the United States pursuant to strong public demand that it do so. In the *Borg-Warner case* it was pointed out by Mr. Justice Black in the leading opinion that the Michigan statute challenged in that case imposed a tax on a private lessee and user of tax exempt property in the conduct of his own business. Further that the taxes imposed by the statute were personal obligations of the private user; that the owner was not liable for the payment of the tax nor was the property itself subject to a lien for the satisfaction of the tax, and that no attempt had been made to levy against the leased property belonging to the government, "Never-

theless", as Mr. Justice Black went on to say, "the Government argues that since the tax is measured by the value of the property used it should be treated as nothing but a contrivance to lay a tax on that property. We do not find this argument persuasive. A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. See *Hennefford v. Silas Mason Co.*, 300 U. S. 577, 582-583."

Obviously, the federal government may not impose federal taxes by contract, since the power to impose federal taxes is vested in the Congress of the United States, or impose state taxes by contract, since the power to impose state taxes is vested in the several States. For the same obvious and basic reasons, the federal government is without power to grant relief from federal or state taxes by the expediency of a contract with a private corporation, since the power to impose taxes necessarily includes the power to grant relief therefrom and that power as respects federal taxes is vested in the Congress and as respects state taxes is vested in the legislative bodies of the several States.

Therefore, whether du Pont may be relieved of state taxes in the performance of its contractual obligations in South Carolina for the government can by no stretch of the imagination be determined by a contract with the AEC in the absence of some valid statute exempting du Pont from such taxation, as by making du Pont an agent with power to bind the government.

Even assuming, without agreeing, that du Pont has rendered without charge services that are valuable to the government, and that the commendable character of the services merit relief from State taxes in the performance of those services, it does not follow that the State of South Carolina should bear the sole burden of that relief. This is particularly true since the effect of such relief would not be for the benefit of du Pont, but solely for the government, in relieving it from its contractual obligation to reimburse du Pont for such taxes.

I would dismiss the complaint and enter judgment for defendants.

A TRUE COPY, ATTEST.

ERNEST L. ALLEN,
Clerk of U. S. Distrct
Court, Eastern District,
South Carolina.

APPENDIX II

Order of the Court Below

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. AC-174

THE UNITED STATES OF AMERICA
AND
E. I. DU PONT DE NEMOURS AND COMPANY,
PLAINTIFFS,
versus
IS W. LIVINGSTON, JAMES W. CRAIN, JAMES H. SULLIVAN, J. A. CALHOUN, JR., AND FRANCIS M. PINCKNEY, INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, DEFENDANTS.

This cause came on to be heard on September 22, 1958, ore a three-Judge District Court, consisting of Simon Sobeloff, U. S. Circuit Judge, Clement F. Haynsworth, U. S. Circuit Judge, and George Bell Timmerman, U. District Judge, for the Eastern District of South Caro-a, Columbia Division, as required by Title 28 U. S. C., tion 2281.

The Court, having rendered its opinion on November 1959, desires that said opinion constitute formal find-s of fact and conclusions of law as provided in Rule 52 he Federal Rules of Civil Procedure.

After consideration of the pleadings filed in this case, evidence adduced at the hearing, the arguments of coun- and the briefs submitted by the parties, this Order is nted because it appears to this Court, as more fully ex-ned in the opinion dated November 18, 1959:

(1) That the procurement activities by du Pont, under and in connection with the performance of Con-tract AT(07-2)-1, as amended, resulted in sales to the

United States and the use by du Pont of personal property purchased, stored, used, or consumed in the performance of said contract is that of the United States;

(2) That the South Carolina sales and use taxes which are the subject matter of this proceeding, are, in fact and in law, sought to be assessed, levied, and collected against the United States of America in violation of the Constitution of the United States, including Article I, Section 8, Clause 18; Article IV, Section 3, Clause 2; Article VI, Clause 2; and the Fourteenth Amendment, Section 1; and Article I, Section 5, of the Constitution of 1895 of the State of South Carolina; and

(3) That the laws of the State of South Carolina do not afford a plain, speedy, and efficient remedy for contesting the validity of said taxes in the courts of that state.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendants, Otis W. Livingston, James W. Crain, James H. Sullivan, J. A. Calhoun, Jr., and Francis M. Pinckney, individually and in their official capacities as the duly appointed, qualified and acting members of the South Carolina Tax Commission, their agents and employees, and all persons acting under their direction, are hereby restrained and permanently enjoined (1) from taking any further step or proceeding whatsoever in the assessment, imposition, levy or collection of sales taxes levied pursuant to the provisions of the South Carolina Sales and Use Tax Act, as amended, Code of Laws of South Carolina, 1952, Sections 65-1351 through 65-1480, on or in respect to personal property purchased, stored, used or consumed by plaintiff, du Pont, under or in connection with the performance of Contract AT(07-2)-4, as amended, during the period July 1, 1951, through March 20, 1954; (2) from taking any further step or proceeding whatsoever in the assessment, imposition, levy or collection of use taxes levied pursuant to the aforesaid South Carolina Sales and Use Tax Act, as amended, on or in respect to personal property purchased, stored used or consumed by plaintiff, du Pont, under or in

connection with the performance of said Contract AT(07-2)-1, as amended, during the period July 1, 1951 through March 31, 1958, and all tax periods occurring subsequent thereto; and (3) from taking any step or proceeding whatsoever to assess, impose, levy or collect any interest or penalty on account of the nonpayment of such sales and use taxes or the failure to file a return with respect to such taxes for the aforementioned periods.

Dated this 28th day of December, 1959.

/s/ SIMON E. SOBELOFF,
U. S. Circuit Judge.

/s/ CLEMENT F. HAYNSWORTH,
U. S. Circuit Judge.

A TRUE COPY ATTEST.

ERNEST L. ALLEN,
Clerk of U. S. District Court,
East. Dist., So. Carolina.

For reasons stated in the dissenting opinion herein, I do not agree with the added findings on page 2 of the foregoing order, which this Court is asked by plaintiffs' counsel to adopt. Evidently counsel thinks that the findings in the majority opinion are insufficient for their ends. In my opinion proposing the three findings for adoption by the Court is only an effort to escape the effect of Congress' action in repealing on October 3, 1953, "the activities clause" of Section 9(b) of the Atomic Energy Act of 1946, and the resultant Supreme Court decisions cited in the dissenting opinion.

Dated this 5th day of January, 1960.

GEORGE BELL TIMMERMAN,
U. S. District Judge.

A TRUE COPY ATTEST.

ERNEST L. ALLEN,
Clerk of U. S. District Court,
East. Dist., So. Carolina.

APPENDIX III

(Pertinent Provisions of S. C. Sales and Use Tax Act)

By Act No. 379, Acts of the General Assembly of South Carolina of 1951, approved by the Governor on April 19, 1951, the State of South Carolina enacted a Sales and Use Tax Law. This law was incorporated in the 1952 South Carolina Code of Laws under Chapter 15 of Title 65 and is shown as Sections 65-1351 through 65-1480, pertinent amendments to the code sections, since its compilation being shown by Act No. 644, Section 15(a), (b) and (c) of 1954 (Code Supplement) in 1952 South Carolina Code of Laws.

The pertinent provisions of the South Carolina Sales and Use Tax Act involved in this matter are set forth below:

§ 65-1357. Purchase.

The term "*purchase*" means acquired for a consideration, whether (a) such acquisition was effected by a transfer of title or of possession, or of both, or a license to use or consume, (b) such transfer shall have been absolute or conditional and by whatever means it shall have been effected and (c) such consideration be a price or rental in money or by way of exchange or barter,

§ 65-1360. Sale.

The term "*sale*" includes:

(1) Any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration;

(2) A transaction whereby the possession of tangible personal property is transferred but the seller retains the title as security for the payment of the price; and

(3) Installment sales and credit sales and the exchange of tangible personal properties as well as a sale for money, every closed transaction constituting a sale.

§ 65-1361. Sale at retail or retail sale.

The terms "*sale at retail*" and "*retail sale*" shall mean all sales of tangible personal property except those defined

in this article as wholesale sales. The quantities of goods sold or prices at which they are sold are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded, are retail sales;

The terms "*sale at retail*" or "*retail sales*" shall also include (a) the withdrawal, use or consumption of any tangible personal property by anyone who purchases it at wholesale, except (i) property which has been previously withdrawn from the business or stock and so used or consumed and with respect to which property the tax has been paid because of such previous withdrawal, use or consumption and (ii) property which enters into and becomes an ingredient or component part of tangible personal property or products manufactured or compounded for sale and not for the personal and private use or consumption of any person so withdrawing, using or consuming it, (b) any tangible personal property which is used directly in fabricating, converting or processing such materials or parts thereof and (c) materials, containers, cores, labels, sacks or bags used for packaging tangible personal property for shipment or sale and any such wholesale purchaser shall report and pay the taxes thereon.

The use within this State of tangible personal property by the manufacturer thereof, as building materials, in the performance of a construction contract, shall, for the purposes of this chapter be considered as a retail sale thereof by such manufacturer, who shall also be construed as the ultimate consumer of such materials or property and who shall be required to report such transaction and pay the sales tax thereon, based upon the reasonable and fair market price thereof at the time and place where they are used or consumed by him. The provisions of this paragraph shall

not apply to any tangible personal property which is specifically exempted from the tax levied in this chapter.

§ 65-1361.1. Same; purchases at retail for storage, etc.

Notwithstanding any other provision of law, sales of any tangible personal property to contractors purchasing such property for use in the performance of contracts and sales of any tangible personal property to contractors purchasing such property either (a) as agents of the United States or its instrumentalities, or (b) for their own account for use in the performance of contracts with the United States or its instrumentalities, are retail sales subject to the tax levied against the vendor as provided by this chapter and are purchases at retail for storage, use or other consumption in this State subject to the tax as provided by this chapter.

(Contained in supplement to 1952 South Carolina Code of Laws. This Section effective March 20, 1954.)

§ 65-1364. Storage.

The term "*storage*" includes any keeping or retention in this State, for any purpose except sale in the regular course of business or subsequent use solely outside this State, of tangible personal property purchased at retail.

§ 65-1367. Use.

The term "*use*" includes the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given, except that it shall not include the sale of that property in the regular course of business.

§ 65-1401. Imposition of tax.

In addition to all other licenses, taxes and charges imposed, there is levied for the support of public schools of the State upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character (not including, however, bonds or other evidences of debt or stocks), an amount equal to three percent of the gross proceeds of sales of the business.

§ 65-1407. Amounts to be added to price because of tax.

Every person or company engaged in or continuing within this State in a business for which a license or privilege tax is required by this article shall add to the sales price and collect from the purchaser on all sales upon the gross receipts or gross proceeds of which there is levied by this article a sales tax at the rate of three per cent an amount equal to the following:

(1) No amount on sales of ten cents or less;

(2) One cent on sales of eleven cents and over, but not in excess of thirty-five cents;

(3) Two cents on sales of thirty-six cents and over, but not in excess of sixty-five cents;

(4) Three cents on sales of sixty-six cents and over, but not in excess of one dollar; and

(5) One cent additional for each thirty-three cents or major fraction thereof in excess of one dollar.

But in no case shall the amount to be added to the sales price of any single article exceed the following sums:

(1) Twenty-five dollars on any article the sales price of which does not exceed fifteen hundred dollars;

(2) Forty dollars on any article the sales price of which is above fifteen hundred dollars but not exceeding three thousand dollars; and

(3) Seventy-five dollars on any article the sales price of which exceeds three thousand dollars.

Section 65-1407, as amended in 1954—See 1952 South Carolina Code Supplement, now reads as follows:

§ 65-1407. Amounts may add to price because of tax.

Every person engaged or continuing within this State in a business for which a license or privilege tax is required by this article may add to the sales price the following:

(1) No amount on sales of ten cents or less;

(2) One cent on sales of eleven cents and over, but not in excess of thirty-five cents;

(3) Two cents on sales of thirty-six cents and over, but not in excess of sixty-five cents;

(4) Three cents on sales of sixty-six cents and over, but not in excess of one dollar; and

(5) One cent additional for each thirty-three cents or major fraction thereof in excess of one dollar.

§ 65-1409. Section 65-1407 and impossibility, etc., of collection from purchaser not to relieve of tax.

The provision of § 65-1407 shall in no way relieve any person subject to the tax imposed by this article from liability for the tax levied by this article; nor shall the inability, impracticability, refusal or failure to add to the sales price and collect from the purchaser the amounts provided therein relieve such person from the tax levied by this article.

§ 65-1421. Imposition of tax.

An excise tax is imposed on the storage, use or other consumption in this State of tangible personal property purchased at retail for storage, use or other consumption in this State at the rate of three percent of the sales price of such property, regardless of whether the retailer is or is not engaged in business in this State.

§ 65-1423. Retailers required to obtain license.

Every seller engaged in making retail sales of tangible personal property for storage, use or other consumption in this State who:

(1) Maintains a place of business;

(2) Qualifies to do business; or

(3) Solicits and receives purchases or orders by agent or salesman;

Shal obtain from the Commission a retail license, as provided for by article 2 of this chapter.

§ 65-1424. Registration by mail order houses, etc.

Every person or company who distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents within the State shall, prior to the commencement of such distribution, register with the Commission and give the name and address of each agent operating in this State, the location of any and all distribution or sales houses or offices or other places of business in this State, the number of persons in the State to whom catalogs are delivered, by mail or otherwise, the number of per-

sons in the State from whom orders are received, by mail or otherwise, together with the amount of the purchase price charged and received and such other information as the Commission may require with respect to matters pertinent to the enforcement of this article.

§ 65-1425. Liability for tax; effect of retailer receipt.

Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this article and the liability shall not be extinguished until the tax has been paid to the State. But a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the Commission, under such rules and regulations as it may prescribe, to collect the tax imposed by this article and who shall for the purposes of this article be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of this chapter, shall be sufficient to relieve the purchaser from further liability for a tax to which such receipt may refer.

§ 65-1429. Seller to make returns.

Every seller engaged in making retail sales of tangible personal property for storage, use or other consumption in this State who:

(1) Maintains a place of business;

(2) Qualifies to do business;

(3) Solicits and receives purchases or orders by an agent or salesman; or

(4) Distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents within the State;

Shall, on or before the twentieth day of the month following the close of the first quarterly period as defined in § 65-1428 and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the Commission a return for the preceding quarterly period in such form as may be prescribed by the Commission showing the total sales price of the tangible personal property sold by such seller, the storage, use or other consumption of which became subject to the tax imposed

by this article during the preceding quarterly period and such other information as the Commission may deem necessary for the proper administration of this article. Returns shall be signed by the seller or his duly authorized agent.

§ 65-1430. Returns of purchasers.

Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this article, who has not paid the tax due with respect thereto to a seller required or authorized under this article to collect the tax, shall, on or before the twentieth day of the month following the close of the first quarterly period as defined in § 65-1428 and on or before the twentieth day of the month following each subsequent period of three months, file with the Commission a return for the preceding quarterly period in such form as may be prescribed by the Commission showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this article during the preceding quarterly period and with respect to which the tax was not paid to a seller required or authorized under this article to collect the tax, and such other information as the Commission may deem necessary for the proper administration of this article. Returns shall be signed by the person liable for the tax or his duly authorized agent.

A return shall be considered to be timely filed if such return is mailed and has a postmark dated on or before the date the return is required by law to be filed.

§ 65-1433. Presumption of liability to tax.

It shall be presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use or other consumption in this State unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this State by the purchaser thereof was purchased from a retailer for storage, use or other consumption in this State.

§ 65-1448. Procedure when segregation of sales and use tax impracticable.

Notwithstanding other provisions of this chapter, when in the opinion of the Commission the nature of a taxpayer's business renders it impracticable or inequitable for the taxpayer to account for the taxes imposed by articles 3 and 4 of this chapter separately, the Commission may issue its certificate to such taxpayer authorizing the sale at wholesale and such taxpayer shall thereupon be accountable for the tax levied by said articles with respect to the gross proceeds of sale of the property withdrawn, used or consumed by such taxpayer for use, consumption or application within this State.

§ 65-1459. Refunds and interest thereon.

If the Commission discovers on examination of a return or otherwise that the tax, penalty or interest paid by any person is in excess of the amount legally due, the Commission may order a refund of such illegally collected tax, penalty or interest. Upon the allowance of a credit or refund of any tax, penalty or interest erroneously, improperly or illegally paid, interest shall be allowed and paid on the amount of such credit or refund at the rate of one-half of one per cent per month from the date such tax, penalty, or interest was paid to the date the order for refund or credit was issued.

§ 65-1466. Payment of tax under protest.

In case any sales or use tax shall be charged by the Commission against any person and the Commission shall claim the payment of the tax so charged or shall take any step or proceedings to collect it, the person against whom such step or proceeding shall be taken shall, if he conceives the same to be unjust or illegal for any cause, pay the tax, which shall include the penalties under protest in writing in such funds and moneys as the Commission shall be authorized to receive. And upon such payment being made the Commission shall pay the taxes and penalties, if any, so collected into the State Treasury as provided by law, giving notice at the time to the State Treasurer that the payment was made under protest.

§ 65-1467. Suit to recover tax paid under protest.

A person paying a tax under the provisions of § 65-1466 may at any time within thirty days after making such payment, but not afterwards, bring an action against the Commission for the recovery thereof in the court of common pleas of any county having jurisdiction. If it be determined in the action that such tax and penalties, if any, were wrongfully or illegally collected for any reason going to the merits, then the court before whom the case was tried shall certify of record that they were wrongfully collected and ought to be refunded, and thereupon the Commission shall issue its order for the refund of the tax and penalties, if any, so paid, in conformity with the order of the court. Such refund shall be paid in preference to other claims against the State Treasury. There shall be no other remedy in any case of the illegal or wrongful collection of the sales or use tax imposed by this chapter, or attempt to collect such taxes, than that provided in this section.

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Supreme Court, U.S.
FILED
MAY 31 1960
JAMES R. BROWNING, Clerk

No. 895

In the Supreme Court of the United States

OCTOBER TERM, 1959

OTIS W. LIVINGSTON, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, APPELLANTS

v.

UNITED STATES OF AMERICA AND E. I. DU PONT DE NEMOURS AND COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

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CHARLES K. RICE,
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INDEX

	Page
Statement	1
Argument	7
I. The court below had jurisdiction to enjoin collection of state taxes by appellants	7
II. The court below properly enjoined South Carolina from taxing du Pont's purchase and use of materials for the Atomic Energy Commission at the Savannah River Plant	13
A. The applicable standard of governmental immunity	14
B. The findings and the evidence below	18
Conclusion	27

CITATIONS

Cases:

Alabama v. *King & Boozer*, 314 U.S. 1	15, 27
Argent Lumber Co. v. *Query*, 178 S.C. 1	10
Board of Commissioners v. *United States*, 139 F. 2d 248, certiorari denied, 321 U.S. 795	11
Bomar v. *City of Spartanburg*, 181 S.C. 453	10
Butler v. *D. A. Schulte, Inc.*, 67 F. 2d 632	8
Carson v. *Roane-Anderson Co.*, 342 U.S. 232	13
City of Detroit v. *Murray Corporation*, 355 U.S. 489	15, 17-18
City of Springfield v. *United States*, 99 F. 2d 860, certiorari denied, 306 U.S. 650	11
Colonial Life & Acc. Ins. Co. v. *South Carolina Tax Commission*, 233 S.C. 129	10
Curry v. *United States*, 314 U.S. 14	15
Denton v. *City of Carrollton, Georgia*, 235 F. 2d 481	10
Educational Films Corp. v. *Ward*, 282 U.S. 379	8
E. I. du Pont de Nemours & Co. v. *State*, 44 Wash. 2d 339	19
Esso Standard Oil Co. v. *Evans*, 345 U.S. 495	15
Federal Power Commission v. *Tuscarora Indian Nation*, 362 U.S. 99	11
Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U.S. 293	8, 12

Cases—Continued

	Page
Hopkins v. *Southern California Tel. Co.*, 275 U.S. 393, affirming 13 F. 2d 814	8
Huddleston v. *Dwyer*, 322 U.S. 232	9
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110	15, 27
Leiter Minerals, Inc. v. *United States*, 352 U.S. 220	12
McCulloch v. *Maryland*, 4 Wheat. 316	15, 18
Monarch Mills v. *South Carolina Tax Commission*, 149 S.C. 219	10
Nutt v. *Ellerbe*, 56 F. 2d 1058	8
Procter & Gamble Distributing Co. v. *Sherman*, 2 F. 2d 165	8
Propper v. *Clark*, 337 U.S. 472	9
Public Utilities Commission v. *United States*, 355 U.S. 534	13
Rohr Aircraft Corp. v. *San Diego*, No. 295, this Term, decided May 23, 1960	14, 15
Southern Ry. Co. v. *Query*, 21 F. 2d 333	8
Spector Motor Service v. *O'Connor*, 340 U.S. 602	10
Spector Motor Service, Inc. v. *McLaughlin*, 323 U.S. 101	12
Township of Hillsborough v. *Cromwell*, 326 U.S. 620	8, 9, 10
United States v. *American Bell Telephone Co.*, 159 U.S. 548	12
United States v. *City of Detroit*, 355 U.S. 466	14, 17, 20
United States v. *City of New York*, 175 F. 2d 75, certiorari denied, 338 U.S. 885	12
United States v. *County of Allegheny*, 322 U.S. 174	15, 18
United States v. *Okaloosa County*, 59 F. Supp. 426	11
United States v. *68,716 Square Feet of Land*, 79 F. Supp. 438, affirmed in part *sub nom. United States* v. *City of New York*, 175 F. 2d 75, certiorari denied, 338 U.S. 885	11
United States v. *Township of Muskegon*, 355 U.S. 484	14, 15, 16, 17, 27
United States v. *United Mine Workers*, 330 U.S. 258	12
United States v. *Woodworth*, 170 F. 2d 1019	11

Statutes:

Atomic Energy Act of 1946, 60 Stat. 755, Sec. 9(b)	6, 13
P.L. 262, 67 Stat. 575	13
28 U.S.C. 1341	7, 8, 10, 11
S.C. Acts (1954), Vol. 48, No. 644, pp. 1566, 1682–1683	6

Statutes—Continued
South Carolina Sales and Use Tax Act, S.C. Code (1952), Secs. 65-1351, *et seq.*.. Page
Sec. 65-1360 5
Sec. 65-1361.1 ..... 5, 20
Sec. 65-1367 5
Sec. 65-1421 5
Sec. 65-1422(1) 5
Sec. 65-1401 5
Sec. 65-1407 6
Sec. 65-1459 9
Sec. 65-1466 9
Sec. 65-1467 9
Miscellaneous:
81 Cong. Rec. 1416-1417 11
H. Rep. 1503, 75th Cong., 1st Sess. 9, 11
Federal Rules of Civil Procedure, Rule 52(a) 19
Revised Rules of the Supreme Court of the United States, Rule 16 1
S. Rep. 694, 83d Cong., 1st Sess 14
S. Rep. 1035, 75th Cong., 1st Sess 9, 11

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 895

OTIS W. LIVINGSTON, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, APPELLANTS

v.

UNITED STATES OF AMERICA AND E. I. DU PONT DE NEMOURS AND COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court which enjoined, as unconstitutional, the imposition by the State of South Carolina of sales and use taxes upon the purchase and use of materials for the Atomic Energy Commission ("AEC") by E. I. du Pont de Nemours and Company ("du Pont"), as the management contractor for

the AEC's production facilities located in South Carolina, known as the Savannah River Plant. The district court (Circuit Judges Sobeloff and Haynsworth, with District Judge Timmerman dissenting) held that under the "unusual" cost-plus-no-profit management contract between AEC and du Pont, the latter was "without hope of gain" or "risk of loss" (Jur. St. 31), that "du Pont's procurement activities resulted in the sale of goods and services to the United States," and that "the purchases were those of the United States and immune from ordinary sales and use taxes upon the purchaser" (Jur. St. 39).

The AEC's Savannah River Plant was begun in 1950 as an essential part in the development of a thermonuclear weapon. It consists of nine principal plants and supporting facilities—five nuclear reactors for the production of plutonium and other materials, and four plants for the production of heavy water, the fabrication of reactor fuel elements, and the processing of reactor products (Exh. P–4).[1] The Sa-

[1] Trial exhibits, which constitute part of the certified transcript of record filed in this Court but which have not been bound with the remainder of the record, will be cited hereinafter as "Exh. P–1," "Exh. P–2," etc. The remaining portions of the certified transcript of record have been bound in three volumes and will be cited as follows: Volume I of the transcript, composed of various pleadings, orders and formal papers below, and paginated consecutively, will be cited as "I–R." Volume II of the transcript, which is the stenographic transcript of the hearing of August 4, 1958, before District Judge Timmerman on motion for temporary restraining order, will be cited as "II–R." Volume III of the transcript, which is the stenographic transcript of the trial of September 22, 1958, before Circuit Judges Sobeloff and Haynsworth and District Judge Timmerman, will be cited as "III–R."

vannah River Plant was designed and constructed and is now operated for the AEC by du Pont under what the court below characterized as an "extraordinary" management contract (Jur. St. 28), providing for extensive control and supervision by AEC and excluding either profit or risk of loss to du Pont (Exh. P-2, Arts. II(2), XIV(2), XXXIV; Jur. St. 30–32, 38).[2] A brief summary of the circumstances which led to the formulation of this contract will give perspective to a consideration of its pertinent provisions.

During the second World War, du Pont at the request of the Government had operated the Manhattan Engineering District's Hanford Works. The company undertook that responsibility only upon the specific understanding that its action was required in the interest of the national security and that it would be relieved promptly after the war since the work was entirely outside the field of chemistry where its commercial activities lay. In 1946, it accordingly withdrew from this atomic energy project (III-R. 138–141). In June 1950, upon the launching of an emergency program aimed at development of the hydrogen bomb, du Pont was again asked by the Government to lend its experience, organization and

[2] Our reference to the contract between du Pont and AEC is throughout to Exh. P-2, the definitive Contract No. AT (07-2)-1, dated September 30, 1953, but effective the date work commenced, August 1, 1950. The previous letter contract, Exh. P-1 (dated October 11, 1950, effective as of August 1, 1950) was merged with and superseded by Exh. P-2 (Exh. P-2, p. 3).

services in the design, construction and operation of this essential new plant. As the court below pointed out, this work was not sought by du Pont and was undertaken by it reluctantly and only on the basis of a clear need on behalf of the security of the nation, a need expressed directly to du Pont by the President of the United States and the Atomic Energy Commission (Jur. St. 29, 40; Exh. P-5; III-R. 139-140).

The contract between AEC and du Pont expressly provided that the construction and operation of the Savannah River Plant was to be without either cost or profit to du Pont, that the latter was to receive a fee of only one dollar, and that any patents or technical data resulting from du Pont's work at the project would become the property of the United States (Exh. P-2, Arts. II(2), XIV(2), XVIII(1), XXV(1), XXXIV).[3]

[3] In explaining to stockholders why du Pont undertook the construction and operation of the Savannah River Plant on this basis, its president pointed out that the company's position remained, as it had been when it withdrew from operation of the Hanford project, in 1946, that its efforts "should be concentrated in its chosen field of chemistry, leaving the development of atomic energy for peacetime applications to those companies whose commercial interest was more closely allied with the field of physics." He explained, however, that du Pont felt that in "the interests of national security * * * it must again place its experience and technical resources at the disposal of the Government by undertaking this new project", and that at the company's request, "the new contract provides that the Government pay all costs, that du Pont receive a fee of one dollar, and that any patents growing out of du Pont's work become the property of the Government". He concluded by explaining that "[w]hile recognizing fully management's obligation to earn a profit on its operations, it is

The South Carolina Sales and Use Tax Act here involved imposes a three percent tax on sales of tangible personal property within the state (S.C. Code (1952), Secs. 65–1401, 65–1407), and a complementary three percent tax on the "storage, use, or other consumption ~~within~~ this ~~the~~ state" of tangible personal property purchased outside the state (S.C. Code (1952), Secs. 65–1367, 65–1421, 65–1422(1)). The Act broadly defines "sale" to include "[a]ny transfer * * * of tangible personal property for a consideration", and "use" to include "the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given * * *" (S.C. Code (1952), Secs. 65–1360, 65–1367).[4]

On May 12, 1958, the South Carolina Tax Commission issued a formal letter ruling that du Pont was liable for such taxes upon its purchases and use of property "for and in connection with the construction and/or operation of the Savannah River Plant of the Atomic Energy Commission located in this State" (I–R. 51). All parties below conceded that, but for the constitutional immunity of the United States from state taxation, there would be no bar to the taxes sought to be imposed under the broad provisions of these tax statutes (III–R. 68–69, 76). At issue in

felt that the nature of this undertaking makes it inappropriate to require a fee for the Company's services" (Exh. P–3).

[4] S.C. Code (1952), Sec. 65–1361.1, effective March 20, 1954, specifically purports to make these taxes applicable to purchase or use by "contractors purchasing such property either (a) as agents of the United States or its instrumentalities, or (b) for their own account for use in the performance of contracts with the United States or its instrumentalities".

this proceeding, according to computations by appellees, are use taxes in the amount of $1,738,000 imposed with respect to materials purchased from out-of-state vendors from October 1, 1953, through March 31, 1958, and sales taxes amounting to $52,000 levied upon purchases from South Carolina vendors during the period October 1, 1953, through March 20, 1954 (I–R. 25–26).[5]

Appellants conceded that title to all the property in question passed directly from the vendor to the Government, and that du Pont's use of such property was "solely on behalf of the United States" (III–R. 49–50, 55). The court below so found and, reviewing the terms of the contract and its implementation in detail, ruled that, at Savannah River, du Pont was the "alter ego" of the AEC, "without hope of gain, except the nominal one dollar" and with "no risk of loss" (Jur. St. 31). It further specifically found that, under the unusual circumstances here, du Pont's purchases for the Savannah River Plant "were those of the United States" (Jur. St. 39), and that the use of materials at the plant was also "so completely that of the United States" (Jur. St. 41) that state taxation was precluded. The district court rejected appellants'

[5] While the validity of the use tax presents a continuing question in the operation of the Savannah River Plant, the sales tax issue is limited to the brief period stated in the text. Effective March 20, 1954, the South Carolina Act was amended to repeal the prior requirement of Sec. 65–1407 that sales taxes paid by sellers must be collected from the purchasers. S.C. Acts (1954), Vol. 48, No. 644, pp. 1566, 1682–1683. The estimate of taxes due begins with October 1, 1953, since, until then, taxes against du Pont as an AEC contractor were clearly barred by a provision of the Atomic Energy Act of 1946, n. 8, *infra*, p. 13.

contention that du Pont had a "separable beneficial and taxable use" of the property because of purchases from du Pont's commercial divisions and the possible training of du Pont employees (Jur. St. 39–41).

ARGUMENT

Appellants challenge both the jurisdiction of the district court to enjoin the collection of these taxes, and the substantive holding that imposition of the taxes is unconstitutional because of the contractual and factual relationships between du Pont and AEC and the absence of any separable beneficial interest of du Pont in the construction and operation of the Savannah River Plant. These two questions were fully considered by the court below and all of the contentions now advanced by appellants were rejected in the comprehensive opinion of Circuit Judge Haynsworth (Jur. St. 19–43). We submit that the decision below is correct and that there is no substantial question warranting plenary hearing by this Court.

I

THE COURT BELOW HAD JURISDICTION TO ENJOIN COLLECTION OF STATE TAXES BY APPELLANTS

Appellants' sole challenge to the jurisdiction of the court below rests upon 28 U.S.C. 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State [Jur. St. 8].

The district court rejected this contention on two separate grounds: (1) there is not a "plain, speedy and efficient remedy in the courts of" South Carolina (Jur. St. 27); and (2) 28 U.S.C. 1341 does not apply to suits by the United States to enjoin the unconstitutional application of state taxes to it (Jur. St. 21). Both rulings are correct, and either one is sufficient to sustain the jurisdiction of the district court.

A. It is well settled that payment of a tax followed by suit in the state courts for refund is not "a plain, speedy and efficient remedy" unless interest will be paid on any judgment entered. *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 386, fn. 2; *Hopkins* v. *Southern California Tel. Co.*, 275 U.S. 393, 399–400, *affirming* 13 F. 2d 814, 820 (C.A. 9); *Butler* v. *D. A. Schulte, Inc.*, 67 F. 2d 632, 635 (C.A. 5); *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. 2d 165 (S.D.N.Y.); *Nutt* v. *Ellerbe*, 56 F. 2d 1058 (E.D.S.C.); *Southern Ry. Co.* v. *Query*, 21 F. 2d 333 (E.D.S.C.).* For, as Judge Learned Hand succinctly pointed out in *Procter & Gamble Distributing Co.*, "a dollar today is worth more than a dollar next year," 2 F. 2d at 166. Although in his dissenting

* Although the cases cited in the text did not arise under 28 U.S.C. 1341, the general equitable principle that they enunciated is equally applicable here. By use of the traditional equity condition of "plain, speedy and efficient remedy," Congress clearly imported settled principles of federal equity jurisdiction for accommodation of federal and state remedies under 28 U.S.C. 1341. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299; *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 623. The pertinent committee reports stated, in fact,

opinion below Judge Timmerman characterized this expression as "a trite saying, a cliche, too unsubstantial to supplant the sovereignty of a sovereign state, if indeed a mere court decision could accomplish that result" (Jur. St. 47), Judge Hand's ruling has been uniformly adopted in the cited decisions of this Court and of the lower federal courts.

In the instant case, the only state remedy available to appellees was payment of the taxes under protest and suit for refund under S.C. Code (1952), Secs. 65–1466 and 65–1467. These sections make no express provision for the award of interest. State statutes do provide for the payment of interest upon administrative refunds (S.C. Code (1952), Sec. 65–1459), but prior to this suit appellants themselves construed this section as inapplicable to a suit for refund (Jur. St. 25; I–R. 51, 56–57; II–R. 35–36, 41). All members of the court below, which included two judges from South Carolina (Circuit Judge Haynsworth and District Judge Timmerman) concluded, after a careful analysis of the South Carolina statutory and case law, that there is at least a substantial doubt under state law as to the right to recover interest in a tax refund suit.[7] "Great deference," of course, is due this determination of state law by federal judges "who are familiar with the intricacies and trends of local law and practice" (*Huddleston* v. *Dwyer,* 322 U.S. 232, 237; *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620,

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that the provision "does not take away any equitable right of the taxpayer." S. Rep. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. 1503, 75th Cong., 1st Sess., p. 2.

[7] The majority concluded that "there is presently grave doubt of the existence of a right to recover interest" (Jur. St. 27).

629–630; *Propper* v. *Clark*, 337 U.S. 472, 486–487). And as the court below recognized (Jur. St. 27), under 28 U.S.C. 1341 the right to interest must be "plain," not uncertain or speculative, to bar equitable relief. *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 605; *Hillsborough* v. *Cromwell*, 326 U.S. at 625–629; *Denton* v. *City of Carrollton, Georgia*, 235 F. 2d 481, 485 (C.A. 5).[7a]

District Judge Timmerman agreed, saying: "If the tax is held invalid, the taxpayer is refunded the amount paid with or without interest as the State Court may determine" (Jur. St. 48). Their conclusion was consistent with the decisions of the Supreme Court of South Carolina which hold that statutes waiving the state's immunity against suits for tax refunds are to be strictly construed to exclude situations not expressly within their terms (*Bomar* v. *City of Spartanburg*, 181 S.C. 453; *Argent Lumber Co.* v. *Query*, 178 S.C. 1), and that interest is not to be awarded against the state except upon express provision therefor in a statute or lawful contract (*Monarch Mills* v. *South Carolina Tax Commission*, 149 S.C. 219; *Colonial Life & Acc. Ins. Co.* v. *South Carolina Tax Commission*, 233 S.C. 129, 152). State statutes make no provision for the award of interest in a judicial proceeding for recovery of taxes paid under protest. See text, *supra*, p. 9. As the court below noted, the 1958 *Colonial Life* decision denied interest in a refund action under statutes similar to the Sales and Use Tax Act (Jur. St. 24–25). The fact that appellants first construed South Carolina law to deny interest in a tax refund suit (*supra*, p. 9), and only under the pressure of the instant litigation reversed their position, further demonstrates the uncertainty of the state remedy and the inapplicability of 28 U.S.C. 1341.

[7a] There is obviously no merit to appellants' contention (Jur. St. 8) that the district court should have stayed its hand pending a determination by the state courts of whether a state court judgment for refund of taxes includes interest. As the cases cited in the text plainly hold, the very existence of this doubt under state law renders the state remedy inadequate; a claimant is not required to pay the disputed tax and assume the risk that the state court will eventually permit him to recover interest.

B. Every federal court that has passed on the question has held that 28 U.S.C. 1341 is not in any event applicable to suits by the United States to enjoin the unconstitutional imposition of state taxes. *United States* v. *Woodworth*, 170 F. 2d 1019 (C.A. 2); *Board of Compissioners* v. *United States*, 139 F. 2d 248 (C.A. 10); certiorari denied, 321 U.S. 795; *City of Springfield* v. *United States*, 99 F. 2d 860 (C.A. 1), certiorari denied, 306 U.S. 650; *United States* v. *68,716 Square Feet of Land*, 79 F. Supp. 438 (S.D. N.Y.) affirmed on this point, reversed on other grounds *sub nom. United States* v. *City of New York*, 175 F. 2d 75 (C.A. 2), certiorari denied, 338 U.S. 885; *United States* v. *Okaloosa County*, 59 F. Supp. 426 (N.D. Fla.); Jur. St. 20–22.

This unbroken line of authority is fully supported by the legislative history of 28 U.S.C. 1341, which shows that it was enacted specifically to prevent out-of-state corporations from challenging state and local taxes in lengthy federal court proceedings (not available to citizens of the state) during the pendency of which payment of taxes was withheld. S. Rep. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. 1503, 75th Cong., 1st Sess., pp. 2–3; 81 Cong. Rec. 1416–1417. The provision does not in terms refer to the United States, and the legislative history contains no intimation of any intent to make it applicable to the Federal Government. Accordingly, this is an appropriate case for application of the settled principle that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *Federal Power Commission* v. *Tuscarora*

Indian Nation, 362 U.S. 99, 120. This Court has deemed this principle particularly compelling when the right of the United States to obtain federal injunctive relief is involved. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *United Mine Workers*, 330 U.S. 258; *United States* v. *American Bell Telephone Co.*, 159 U.S. 548.

C. The court below also considered the question of whether, apart from its jurisdiction or power to grant equitable relief, it should in its discretion stay its hand. The determination by the court that under these special circumstances no such exercise of discretion was appropriate plainly presents no question of substance here. Unlike the situation in *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, and *United States* v. *City of New York*, 175 F. 2d 75, certiorari denied, 338 U.S. 885, no issue of state law is involved. All parties conceded at the trial that, but for the questions raised under the Constitution of the United States, there was liability for the state taxes involved (III-R. 68-69, 76), and the court below accordingly found that the only issue presented was "not dependent upon the resolution of any question of state law" (Jur. St. 22). Similarly, the doctrine that a federal court of equity should in an appropriate case "refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest" (*Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 297-98), is plainly inapplicable, since the interests of the United States are involved here and since the remedy afforded by an action in the state courts is in any event not adequate (see *supra*, pp. 8-10, see also *Pub-*

lic Utilities Commission v. *United States*, 355 U.S. 534, 539–540). Under these circumstances no substantial contention can be made that the court below abused its discretion in refusing to dismiss the complaint or to stay proceedings pending action in the state courts.

II

THE COURT BELOW PROPERLY ENJOINED SOUTH CAROLINA FROM TAXING DU PONT'S PURCHASE AND USE OF MATERIALS FOR THE ATOMIC ENERGY COMMISSION AT THE SAVANNAH RIVER PLANT

A majority (Circuit Judges Sobeloff and Haynsworth) of the three-judge district court held that South Carolina could not constitutionally impose its sales and use taxes upon du Pont's purchase and use of AEC property at the AEC's Savannah River Plant. That ruling was based upon a close analysis of the "extraordinary" contractual relationship between du Pont and AEC at this plant, as a result of which the court found that du Pont's purchases and use of materials were those "of the United States" and immune from taxation, and that du Pont had no "separable beneficial" interest subject to taxation (Jur. St. 28, 39, 41).[4] We submit that, in so

[4] The district court also correctly held that there was no Congressional waiver of the Government's constitutional immunity from the instant taxes. In 1953, Congress repealed the last sentence of Section 9(b) of the Atomic Energy Act of 1946 (60 Stat. 755, 765–766), exempting "the property, activities and income of the Commission" from state taxation, which had barred sales and use taxes upon AEC contractors, as held in *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232. P.L. 262, 67 Stat. 575.

holding, the district court correctly applied the standards for determining the constitutional immunity of Federal activities from state taxation developed by this Court, and reiterated only two years ago. There is, therefore, no substantial question concerning the applicable law. This appellants apparently concede by devoting the bulk of their argument to "the correctness of the findings of the trial Court" (Jur. St. 9–12). Moreover, the exhaustive findings below are abundantly supported by the record and indeed by appellants' own concessions. There is, accordingly, also no factual question of substance now presented.

A. THE APPLICABLE STANDARD OF GOVERNMENTAL IMMUNITY

"In the absence of Congressional consent, as this Court has recently reiterated, the Constitution forbids the states from taxing "the Government of the United States or its property," *United States* v. *City of Detroit,* 355 U.S. 466, 469; cf. *Rohr Aircraft Corp.* v. *San Diego,* No. 295, this Term, decided May 23, 1960. The decisions of this Court also leave no doubt, as appellants recognize (Jur. St. 13), that the relationship between the Government and a contractor may be such that the constitutional immunity of the United States extends to acts of the contractor. *United States* v. *Township of Muskegon,* 355 U.S. 484, 486; *Kern-*

However, this clearly did not constitute consent to taxation. Congress intended merely to "place the Commission and its activities on the same basis, with respect to immunity from State and local taxation, as other Federal agencies. Immunity from taxation will be by virtue of the Constitution of the United States, as interpreted by the courts." S. Rep. 694, 83d Cong., 1st Sess., p. 3; see Jur. St. 33–34.

Limerick, Inc. v. *Scurlock*, 347 U.S. 110, 117, 122; *McCulloch* v. *Maryland*, 4 Wheat. 316, 436. Appellants would limit this principle to situations where the contractor is "a contractually declared agent of the United States" (Jur. St. 11-14). This Court has made it plain, however, that "[c]onstitutional immunity from state taxation does not rest on such insubstantial formalities." *United States* v. *Township of Muskegon*, 355 U.S. at 486. The Court "must look through form and behind labels to substance" (*City of Detroit* v. *Murray Corporation*, 355 U.S. 489, 492), and must consider "all relevant circumstances" (*United States* v. *City of Detroit*, 355 U.S. at 469; cf. *Rohr, supra*).

Whether the contractor is formally designated as "agent" of the United States in the contract is not controlling. The critical inquiry is whether the contractor has sufficient independent private interest to render it separately taxable; if not, the taxable property or act (*e.g.*, purchase, use, possession) is that of the United States and immune from taxation.[9] This is the precise approach taken by the court below when it examined the relevant facts and circumstances, held

[9] This principle is illustrated by the line of decisions leading up to the 1958 Michigan cases, in each of which the immediate taxpayer was clearly a private contractor, and the question posed was whether in effect the United States was the purchaser (sales tax—*Kern-Limerick, Inc.* v. *Scurlock*, *supra*; *Alabama* v. *King & Boozer*, 314 U.S. 1); the user (use tax—*Curry* v. *United States*, 314 U.S. 14); the one exercising a privilege of storage (privilege tax—*Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495); or the owner of property (property tax—*United States* v. *County of Allegheny*, 322 U.S. 174). In *Kern-Limerick* and *Allegheny County*, the claim of immunity was sustained.

that the Government's constitutional immunity is "not dependent upon the use, or omission, of a magic label" (Jur. St. 38), and concluded that the purchase and use of the property in question were those of the United States.

The recent Michigan cases reaffirmed that the constitutionality of a state tax upon a private party's dealings with Government property depends essentially upon the existence of a commercial benefit accruing to the private party from such dealings, or at least upon the existence of an opportunity to use the property for the party's own benefit. In *United States* v. *Township of Muskegon*, 355 U.S. 484, the Court upheld the constitutionality of a use tax based on the value of Government property used by a company (Continental Motors) in the course of performing supply contracts for profit with the United States, stating (355 U.S. at 486):

> The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a "servant" of the United States in agency terms. But here Continental was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

The Court thus indicated that elements necessary to the finding of taxability of a contractor were, in addition to the existence of the contractor as a private commercial enterprise, its separate interest in conducting operations under the contract for its own "financial gain" or "in maximizing its profits," and the contractor's freedom from Government supervision and control, *i.e.*, its ability "within broad limits to use the property as it thought advantageous and convenient" for its own purposes. See 355 U.S. at 486.

Similarly, in *United States* v. *City of Detroit*, 355 U.S. 466, a Michigan tax on the use of Government property by a private party was found constitutional where the use was "in a business conducted for profit." The Court emphasized that the tax was "imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage'." 355 U.S. at 467, 472. Finally, in the third of the 1958 cases, *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, the taxpayer's use of Government property in furtherance of its private commercial business was again the crucial constitutional fact in sustaining a personal property tax (355 U.S. at 493):

> As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. * * * In their practical operation and effect the taxes in question are identical to those which we upheld in [*City of Detroit* and *Township of Muskegon*] * * *. We see no essential difference so far as constitutional tax immunity is concerned

between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends.

In the light of these cases, it would seem beyond dispute that where (as here) the court finds no beneficial private interest, nor any opportunity to use property for such an interest, state taxation is unconstitutional because, in the words of Chief Justice Marshall, it would be a tax "on the operation of an instrument employed by the government of the Union to carry its powers into execution." *McCulloch* v. *Maryland*, 4 Wheat. at 436–437. See also *United States* v. *County of Allegheny*, 322 U.S. 174, 176–177.

B. THE FINDINGS AND THE EVIDENCE BELOW

The applicable law is settled. Accordingly, the central issue appellants present to this Court is one of fact: whether the record supports the district court's findings that du Pont's purchase and use of materials at the Savannah River Plant were those "of the United States," and that du Pont was acting as the "alter ego" of the United States, without any separable beneficial interest, and "without hope of gain, except the nominal one dollar, payable upon final completion of the contract" (Jur. St. 31–32, 39–41).

Although appellants assert the existence of a "substantial question as to the correctness of the findings of the trial Court" (Jur. St. 10), they fail to cite any evidence at all from the record below.[10] The correctness of the findings below is, indeed, established by the

[10] This lack is not remedied by appellants' citation of a state court's characterization of du Pont's activities at Hanford

uncontradicted testimony in the record, the conceded facts concerning the operation of the Savannah River Plant, and the terms of the "extraordinary" no-profit contract between AEC and du Pont (see *supra*, pp. 3–5).

1. The fundamental facts showing the absence of any independent commercial interest in du Pont were actually stipulated by appellants in open court (III–R. 49–50):

> Each and every operation carried on by du Pont in the procurement and physical use of the material here involved was solely on behalf of the United States. Du Pont did not, as a matter of fact exercise any separate interest in the property involved. Its procurements were solely on behalf of the United States. Its physical use of the property owned by the United States was to accomplish the aims of the United States. At no time did du Pont have the beneficial use of such property for its private ends. The state reserves its position that du Pont had a profit motive in this contract. * * *

Thus, while seeking to infer a "profit motive" from alleged indirect advantages to du Pont (*infra*,

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during the Second World War (Jur. St. 11). *E. I. du Pont de Nemours & Co.* v. *State*, 44 Wash. 2d 339. Each case must be weighed on its own facts. Moreover, the record below shows that there are differences between du Pont's relationship with the Government at Hanford and at Savannah River. See III–R. 144–145.

Appellants' complaint that the court below should have separately stated its findings of fact and conclusions of law (Jur. St. 9) is answered by the provision of F. R. Civ. P., Rule 52(a), that it is sufficient for such findings and conclusions to appear in the court's opinion.

pp. 24–26), appellants concede that it had no direct commercial interest whatever in the operation of the Savannah River Plant.[11] As the record shows, du Pont does not have any property of its own at Savannah River, nor does it undertake any commercial use of the Government's property (III–R. 43, 55, 119, 121; Exh. P–2, Art. XIII(1)). Du Pont does not even utilize its own funds, but finances the operation and pays for materials by drawing directly upon Government funds which are advanced from time to time, and placed in bank balances belonging to the United States and treated as public deposits (Exh. P–2, Art. XVII; III–R. 124–126). Further implementing the intent that the only business at Savannah River is the AEC's, the contract specifically provides that all work is done at the Government's risk and expense, with none to du Pont (Exh. P–2, Arts. II(2), XXXIV);[12] and that while payment or reimbursement

[11] This concession is particularly significant, since, in this Court's 1958 tax immunity cases, *supra*, pp. 16–18, Michigan sought to tax only private commercial enterprises. Indeed, the use tax involved was in terms directed only against use "by a private individual, association or corporation in connection with a business conducted for profit * * *." *United States* v. *City of Detroit*, 355 U.S. 466, 467–468 n. 1. In contrast, not only does the South Carolina Sales and Use Tax Act contain no such limitation, but it expressly purports to cover sales to, and use by, contractors acting "(a) as agents of the United States or its instrumentalities, or (b) for their own account for use in the performance of contracts with the United States or its instrumentalities * * *." S.C. Code (1952), Sec. 65–1361.1. Moreover, it contains no analogous provisions taxing the agents or instrumentalities of the state.

[12] Du Pont's status, as solely the manager of AEC's plant, is exemplified in the unusually broad indemnity clause. Art. XXXIV of the contract (Exh. P–2) provides that in view of the

of all expenses is guaranteed (Exh. P–2, Arts. XV, XXXIV), du Pont is entitled only to "[a] fixed-fee in the amount of one dollar ($1.00)" (Exh. P–2, Art. XIV(2)).[13]

2. Nor do appellants controvert any of the facts concerning the extensive control maintained by the AEC over the Savannah River Plant operations—control, which, when taken with the absence of profit in the undertaking, was sufficient to make du Pont, in the words of the court below, the "alter ego" of the Government (Jur. St. 30–32).

At the hearing below, indeed, appellants specifically conceded that du Pont's employees at Savannah River operated under the AEC's "control * * * practically man by man" and under AEC's "over-all direction" (III–R. 8, 38–39). Appellants have further conceded that the contract between du Pont and AEC, and the allegations of the complaint in this case, correctly represent the actual method of operation, supervision and

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fixed fee of one dollar, the unusual and unpredictable hazards and the nature, scope, and magnitude of the work, the Government shall indemnify and hold du Pont harmless against any delay, failure, loss, expense or damage of any kind and for any cause whatsoever, arising out of or connected with the work, and whether or not any employee or employees of the Contractor is or are responsible, unless caused directly by bad faith or wilful misconduct on the part of specified corporate officers acting within the scope of their authority and employment.

[13] The contract further provides that any drawings, designs, specifications or technical data developed under it are to be the property of the AEC (Exh. P–2, Art. XVIII(1)), and patentable discoveries or inventions are subject to the AEC's disposition, without pecuniary compensation to du Pont (Exh. P–2, Art. XXV(1)).

control in effect at Savannah River (III–R. 42, 55, 48–49, 109). Accordingly, it must be taken as established that, as the contract states, the Commission has "power to exercise appropriate control over the contract work and full access to information concerning the Contractor's performance of such work" (Exh. P–2, Art. IV). The contract provides, and the record shows, that AEC inspects and audits all activities of the Contractor under the contract (Exh. P–2, Art. XVIII(4); III–R. 117, 127) and requires detailed reports as to many of them (Exh. P–2; Art. XVIII (6); Exh. P–6).

Particularly close supervision by the AEC of the procurement of supplies and materials is provided. AEC reviews and audits all purchases (Exh. P–2, Art. XVIII(4)). Contracts in excess of $2,000 must be in writing, and advance approval of the AEC must be obtained in writing for those in excess of $10,000,[14] and for all purchases in any amount from du Pont's commercial divisions (Exh. P–2, Arts. XXII(1), III (7); III–R. 112–120).[14a] Procurement procedures must be reduced to writing and are made subject to the approval of the AEC (Exh. P–2, Art. XXII(1)). Vendors are on notice that all purchases are for the benefit of the Government and that title will pass directly from the vendor to the Government

[14] As the court below found, almost 75% of the dollar amount of purchases involved here fell into the category requiring "prior specific approval" of the AEC (Jur. St. 32, 39; III–R. 132–134).

[14a] For practical reasons, the AEC has given blanket advance approval of procurement purchases from du Pont of under $100 (III–R. 113, 131). These purchases are, of course, subject to subsequent audit and review.

(Exh. P-2, Art. XIII(1); Exhs. P-8, P-9, P-10; III-R. 55). Financing of all purchases is with Government funds, as noted *supra*, p. 20.

Among other things, AEC controls the flow of feed materials, the level of production and of inventories (III-R. 99, 103, 120), training programs, research and development projects and safety standards and procedures (Exh. P-2, Arts. VII, IX, XXIII; III-R. 107, 112-120), and can require du Pont to remove employees whose work is deemed incompetent or whose continued employment is contrary to the public interest (Exh. P-2, Art. XXIV(3); III-R. 116). Du Pont is required to choose a resident supervising representative "satisfactory to the Commission" (Exh. P-2, Art. XXIV(2)). As testified, and found by the district court, AEC maintains a staff of approximately 230 at the Savannah River Plant organized in divisions parallel to du Pont's organization. Through its on-site staff, the AEC is able to maintain close supervision and control of du Pont's activities and operations under the "detailed procedures" prescribed by AEC (Jur. St. 32; III-R. 98-99, 106-07).[15]

[15] Appellants' stipulation to the veracity of the complaint (III-R. 42, 48-49, 55) further establishes that, as alleged, the Savannah River Plant is "an integral and indispensable part of the processing and manufacturing facilities of the Atomic Energy Commission"; that du Pont's work is "carried on in close day-by-day cooperation with the Atomic Energy Commission and its staff"; and that AEC "established the objectives, made the decisions required to fit the operation into the national program and otherwise exercised the control and supervision necessary to assure achievement of the desired governmental objectives" and continues to do so (I-R. 13-14).

3. None of the foregoing facts is disputed by appellants. Their attack on the findings involves only the claim that, despite these facts, "du Pont [nevertheless] had a profit motive in this contract" (*supra*, p. 19). The court below explicitly found, however, that the company had undertaken the contract "without hope of gain, except the nominal one dollar, payable upon final completion of the contract" (Jur. St. 31), and that "[t]here is every indication that du Pont accepted this contract and its obligations out of the high sense of public responsibility, despite deprivation, which its president expressed to its stockholders in 1950" (Jur. St. 40).

Appellants challenge these findings, first, by asserting that du Pont is "not a charitable corporation" (Jur. St. 10). Of course this is so, but the evidence in the record is overwhelming and completely uncontroverted that du Pont's activities at the Savannah River Plant have been undertaken neither for profit nor for furtherance of its ordinary corporate interests. As the court below pointed out (Jur. St. 29, 40), this conclusion is compelled by the circumstances surrounding du Pont's undertaking of the project, including the fact that du Pont had previously withdrawn from operation of another atomic energy plant, that this assignment was taken on reluctantly and only at the urgent appeal of the AEC and the President of the United States as an essential defense measure, and that du Pont had no plans in 1950, and has none now, to enter the atomic energy field in a commercial venture (III-R. 51, 121, 139–141, 147–148). Its activities under the contract

have never been carried on the company's books as of value (III–R. 127, 135–36), and officials of both AEC and du Pont testified flatly that du Pont did not receive any known profit of any kind from such activities (III–R. 126, 128, 134–35, 140). See Statement, *supra*, pp. 3–4, n. 3.

Appellants further argued to the court below, and are now asking this Court to find, that a sufficient "profit motive" nevertheless existed because (1) du Pont sold a relatively small amount of its own commercial products to the Savannah River Plant and (2) du Pont is obtaining scientific training and experience for its Savannah River employees at Government expense (Jur. St. 31; III–R. 43–45). The district court specifically rejected these contentions in its findings (Jur. St. 39–41), which are fully supported by the record.

Whenever du Pont submitted price quotations for the supply of its commercial products, the AEC itself assumed direct control of the purchase, solicited bids from other suppliers, and awarded the order. This was in accordance with a specific contract provision making all such purchases subject "to the prior written approval of the Commission" (Exh. P–2, Art. III(7); *supra*, p. 22). The total commercial products of du Pont purchased at Savannah River were valued at only $1,379,000, less than ¼% of the $557,085,000 in materials procured during the period in issue (III–R. 13, 115, 131–132). On almost half of its offers in this category ($1,112,000 worth) du Pont in fact lost out to other bidders (Jur. St. 39–40; III–R. 112–113, 115–116, 131, 136–137). As the court below

summarized it, "[C]areful safeguards were employed to assure that du Pont's managerial functions did not influence the procurement of du Pont's products" (Jur. St. 40). Thus it appears that the purchase of du Pont's commercial products would have been the same regardless of the firm which was the management contractor. These purchases, therefore, do not constitute a profit arising from the management contract, could not have motivated du Pont, and cannot remotely be considered a "separable benefi[cial use]" for tax purposes (Jur. St. 40).

The alleged benefit from the scientific and technical training of du Pont employees is refuted by the fact already noted, that the Savannah River Plant is in a field in which du Pont has no commercial interest. Appellants' "speculation" on this point, in the words of the district court, "ignores the history of du Pont's withdrawal in 1946 from the management of the Hanford Engineer Works, its reluctant acceptance of its present commission, and the fact that the work at Savannah River Plant is now, and in all likelihood will long remain, a monopoly of Government" (Jur. St. 40).

In short, as the court below held (Jur. St. 40–41), the alleged advantage to du Pont is so indirect, tenuous and hypothetical as to be of no weight compared to the undisputed facts concerning the relationship of du Pont and AEC at the Savannah River Plant, set forth *supra*, pp. 19–26. The analogy of federal employees, cited by the court below, shows that even direct remuneration does not necessarily impair the Government's tax immunity for governmental activities which are carried out by "a 'servant' of the United States" (*United States* v. *Township of Mus-*

kegon, 355 U.S. 484, 486). Whether an individual or a company falls in the category of those whose activities are thus constitutionally immune from state taxation depends upon the entire relationship with the Government, and on the appraisal of the applicable contractual provisions and all the pertinent facts. The district court made just such an appraisal in this case, and concluded that under the contract du Pont was intended to be, and in fact is, the "alter ego" of the United States without any separable beneficial interest or "hope of gain" (Jur. St. 31); that such activities "resulted in the sales of goods and services to the United States"; that the "purchases were those of the United States"; and that the use of the goods was "completely that of the United States" (Jur. St. 38–39, 41). On the basis of these findings, the district court properly enjoined the imposition of state sales and use taxes upon du Pont's purchases and use of AEC property at the Savannah River Plant.[16]

CONCLUSION

The court below correctly applied settled principles to the particular facts of this case. Accordingly, this

[16] With respect to sales taxes, the court below made an additional and alternative determination that du Pont's purchases were in effect as "purchasing agent" for AEC (Jur. St. 38–39). This was in line with decisions of this Court that have recognized the immunity of acts done, whether or not for personal gain, by those who have the authority to act for the United States and impose legal liability upon it. See *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 120–122; *Alabama* v. *King & Boozer*, 314 U.S. 1, 13–14.

Appellants challenge the above finding on the ground that the contract here employs the term "agent" only with regard to rental of government housing (Exh. P-2, Art III(11); Jur. St. 11). However, the court properly rejected this argument, pointing out (Jur. St. 38–39): "An agent * * * need not be

appeal presents no substantial question warranting further argument. The judgment of the district court should be affirmed.

Respectfully submitted.

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MAY 1960.

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called by that name to be one. Liabilities of principals and immunities from taxation are not dependent upon the use, or omission, of a magic label. It is clear that du Pont's procurement activities were authorized, and were openly on behalf of the United States, and at the government's expense and risk." While referring to du Pont as the equivalent of a purchasing agent for the United States, the court below recognized that federal procurement provisions applied to du Pont's activities only to the extent prescribed by the contract between AEC and du Pont (Jur. St. 31–32).

U.S. GOVERNMENT PRINTING OFFICE: 1960

No. 895

Supreme Court of the United States

OCTOBER TERM, 1959

OTIS W. LIVINGSTON, JAMES W. CRAIN, JAMES H. SULLIVAN, J. A. CALHOUN, JR., AND FRANCIS M. PINCKNEY, INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, APPELLANTS,

versus

THE UNITED STATES OF AMERICA, AND E. I. DU PONT DE NEMOURS AND COMPANY, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	3
I. The court below erred in holding that du Pont was the agent of and the alter ego of the United States and immune from taxes	4
II. The finding by the court below that du Pont was supervised and controlled to the extent that it was an agent was error	6
III. The court below improperly found that the sole consideration flowing to du Pont was the sum of one dollar ($1.00)	7
IV. The court below should have refused jurisdiction to enjoin the assessment and collection of the taxes	9
Conclusion	10

CITATIONS

Cases:

Page

Carson v. Roane-Anderson Company, 342 U. S. 232, 239, 72 S. Ct. 257 7

City of Springfield v. United States (C. C. A. Mass., 1939), 99 F. (2d) 860, Cert. denied, 306 U. S. 650, 59 S. Ct. 592 9

Commercial Illinois Nat. Bank & Trust Co. of Chicago v. United States, Ct. Claims, 81 F. Supp. 598, 112 Ct. Cl. 563 7

Corry v. United States, 313 U. S. 14 5

Detroit v. Murray Corporation of America and the United States of America, 355 U. S. 489 8

du Pont v. State (1954), 11 Wash. (2d) 329, 97 P. (2d) 667 ..... 4, 5

E. I. du Pont de Nemours and Company and the United States v. Lyles and Lang Construction Company (C. C. A., 4th Cir.), 219 F. (2d) 328, Cert. denied, 349 U. S. 956, 99 L. Ed. 1280, 75 S. Ct. 882 6

Korn Limerick v. Scurlock, 347 U. S. 110 5

Steeber Motor Service v. O'Connor, 340 U. S. 602 9

State v. Barnes, 66 S. E. (2d) 33, 219 S. C. 485 5

State of Alabama v. King and Boozer, 314 U. S. 1 5

Toomer v. Witsell, 334 U. S. 385 9

United States v. Rickert, 188 U. S. 432, 444, 23 S. Ct. 478 9

United States of America v. Township of Muskegon and Continental Motors, 355 U. S. 484 8

United States of America and Borg Warner Corporation v. City of Detroit, 355 U. S. 466 8

Constitution, statutes and rules:

28 U. S. C.:

1341 ..... 3, 9

Title 65, 1952 South Carolina Code of Laws:

Section 1459 3

Section 1466 3

Section 1467 3

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Pursuant to Rule 16, paragraph 3, of the Revised Rules of this Court, appellants submit this brief in opposition to appellees' motion to affirm.

STATEMENT

This appeal is from a final order of a statutory three-judge district court restraining and enjoining appellants from levying and assessing South Carolina sales and use taxes from E. I. du Pont de Nemours and Company (hereinafter referred to as "du Pont") with respect to the purchase and use in South Carolina by du Pont of items of tangible personal property in carrying out its obligations as contractor with the Atomic Energy Commission (hereinafter referred to as "AEC") at its Savannah River Plant.

The majority Court held that du Pont was the "*alter ego*" of the United States, which is to say, that to tax du Pont is to tax the United States, and further holding that, under the contract between the parties, du Pont was "without hope of gain" or "risk of loss" (Jur. St. 31). District Judge Timmerman dissented holding that the taxes were properly assessable against du Pont; "an independent contractor on the Savannah River Project". (Jur. St. 50). Judge Timmerman further held that du Pont did not enter into the contract "without hope of gain, except the nominal sum of one dollar payable on final completion of the contract" (Jur. St. 50). The foregoing presents a substantial federal question.

On May 12, 1958, appellants notified du Pont that the purchases of tangible property purchased by du Pont and used by du Pont in South Carolina would be subject to the taxes. At no time have appellants attempted to tax the United States itself.

Appellees conceded that, standing alone, the provisions of the South Carolina Sales and Use Tax Act would impose the taxes (Tr. Vol. III, 68-69, 76).[1] However, appellees contended that, nonetheless, the taxes were barred by the constitutional immunity of the United States from state taxation and the Court so held.

Additionally, there is the question whether the three-judge district court should have dismissed the complaint or, in the alternative, should have retained jurisdiction but should have permitted construction by state Courts as to whether the remedial provisions of the South Carolina Sales and Use Tax Act, which particular provisions have never been construed by the South Carolina Supreme

[1] This reference here and elsewhere herein is to one of three bound volumes of the certified transcript of record and is the official stenographic transcript of the hearing before the three-judge district court on September 22, 1958.

Court, allow recovery of interest on monies paid under protest (Jur. St. 71-72).[2]

The provisions of 28 U. S. C. 1341 deny to district courts the right to enjoin and restrain the levy and collection of any tax under state law where a plain, speedy and efficient remedy may be had in state courts.[3]

This matter presents substantial federal questions in which not only the appellants but also the several states, particularly those having sales and use tax provisions, have a real interest and have exhibited such interest.

ARGUMENT

In their motion to affirm appellees have made a factual argument and have laid emphasis upon certain facts which they would use to induce this Court to refuse to hear the appeal with plenary hearing therein. It is respectfully submitted that, in reality, this matter presents substantial questions warranting plenary consideration with briefs on the merits and oral argument for their resolution. The motion is without merit. The federal questions presented are not frivolous. They were decided in a manner in conflict with decisions of this Court and other federal courts.

As District Judge Timmerman pointed out so aptly in his dissenting opinion, it is a duty of a Court to take into consideration the reasonableness of any statement or contention made by a litigant, or in its behalf (Jur. St. 51).

Appellees have laid emphasis upon the "extraordinary" contractual relationship between AEC and du Pont (Motion to Affirm, 13). Appellants, likewise, suggest that the contract is "extraordinary" but extraordinary in that,

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[2] These remedial provisions are Sections 65-1459, 65-1466 and 65-1467 of the 1952 South Carolina Code of Laws.

[3] 28 U. S. C. 1341 provides "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

if the parties had in mind making du Pont the "*alter ego*" of the United States, as they have contended, they clearly failed to do so. Additionally, appellants point out that the undertakings, apart from the contract itself, going on at the Savannah River Plant have been considered super secret and properly so. Appellants, in the very nature of things, have had no way to know, in fact, the details of the activities. However, the reasonableness of the contentions of appellees can be carefully analyzed and that was done in the dissenting opinion of Judge Timmerman (Jur. St. 44-60).

I

The Court below erred in holding that Du Pont was the Agent of and the alter ego of the United States and immune from taxes.

This finding was necessary in order to immunize du Pont from state taxation. It had to be found apart from the specific provisions of the contract itself.[1]

There are two features in connection with this contract, in this all important particular, which should be carefully noted. First, the matter of agency was not overlooked between the parties because under the specific provisions of Section 11, Article III of the definitive contract, du Pont, like with du Pont in the Hanford Project in Washington, was declared and affirmatively made agent but for one purpose only, that is, for the leasing of houses, stores and other buildings.[2] Second, it is noted that the contract between du Pont and AEC antedated, by a number of years, both the decisions in *Du Pont v. State*, dealing with the Hanford

[1] This reference is to the definitive contract between AEC and du Pont bearing Contract No. AT(07-2)-1, dated September 30, 1953, and to the previous letter contract dated October 11, 1950. These trial exhibits are a part of the certified transcript of record but have not been bound with the remainder of the record. Like appellees, we denote, for purpose of reference herein, the letter contract as Exh. P-1, and the definitive contract as Exh. P-2.

[2] Paragraph 11, page 2, Exh. P-2.

Project and also in *Kern-Limerick v. Scurlock*, which two cases, particularly the latter, would serve to guide in the all-important matter of agency status of those contracting with the Government in relation to tax immunity.[3] Thus, the guide of these cases was not in the minds of the contracting parties at the time of the execution of the contract between AEC and du Pont here. As a matter of fact, the several decisions by the Court in the field of sales and use taxes prior to *Kern-Limerick* had served to permit the imposition and collection of sales and use taxes with respect to government contractors.[4] Of course, appellants contend that the factual situation in *Kern-Limerick* is clearly distinguishable from that involved here and that the majority opinion in *Kern-Limerick* supports the position of appellants. Three present members of this Court dissented in *Kern-Limerick* and held that the test lies in where the legal incidence of the tax rests. That, in South Carolina, has been determined by the South Carolina Supreme Court in *State v. Barnes*, 66 S. E. (2d) 33, 219 S. C. 485. It is upon the seller in regard to a sales tax and upon the user, storer or consumer in relation to a use tax. As the minority said in *Kern-Limerick*:

> "We should decide today, as we did more than a decade ago, that a tax on a contractor for the goods he uses is constitutional, even though the economic burden falls on the Federal Government."

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[3] *Du Pont v. State* (1954), 44 Wash. (2d) 339, 267 P. (2d) 667 and Kern-Limerick v. Scurlock, 347 U. S. 110.

[4] *State of Alabama v. King and Boozer*, 314 U. S. 1, and *Curry v. United States*, 314 U. S. 14, were among the leading cases.

II

The finding by the Court below that Du Pont was supervised and controlled to the extent that it was an agent was error.

This finding by the Court, appellants respectfully submit, is unrealistic and unreasonable when examined in the light of the specific terms of the contract. In the first place, du Pont was hired because of its peculiar and special qualifications to do the job. It is strange to assert, as appellees have done, that the AEC, which hired du Pont because of its unique qualifications and experience would supervise, control and direct the expert in this field on a man to man basis. Further, it is most unreasonable to conclude that two hundred thirty (230) AEC personnel could direct, control and supervise seven thousand (7,000) du Pont employees on such a basis. (Tr. Vol. III, 106).

Finally, in this connection, the contract terms themselves operate against such a finding. These terms, so aptly covered by Judge Timmerman, vest in du Pont much independence and exercise of judgment (Jur. St. 49-50). There, du Pont is authorized to furnish or procure the labor, materials, tools, machinery, equipment, facilities and supplies and to do all things which in du Pont's judgment are necessary and desirable. Also, du Pont was to furnish and procure architect, engineer and other services incident to the design, procurement of materials and equipment, inspection and supervision of construction of the plants. The other contract provisions, with equal clearness, denote the area of independence on the part of du Pont.

In a case arising in the eastern district of South Carolina and out of the Savannah River Project itself, *E. I. du Pont de Nemours and Company and The United States v. Lyles and Lang Construction Company* (C. C. A. 4th Cir.), 219 F. (2d) 328, Cert. denied, 349 U. S. 956, 99 L. Ed. 1280,

75 S. Ct. 882, the Circuit Court of Appeals held that the contract of the plaintiff (the subcontractor) was with defendant (du Pont), not with the United States, and the Court went on to say:

> "* * *, and defendant in making it was acting as an independent contractor, not as an agent of the government. Cf. *Carson v. Roane-Anderson Company*, 342 U. S. 232, 236, 72 S. Ct. 257, 96 L. Ed. 257; *Continental Illinois Nat. Bank & Trust Co. of Chicago v. United States*, Ct. Claims, 81 F. Supp. 596, 112 Ct. Cl. 563."

Such situation would be equally applicable here.

III

The Court below improperly found that the sole consideration flowing to Du Pont was the sum of one Dollar ($1.00).

This finding is likewise respectfully submitted to be unrealistic and contrary to sound reason.

Without for one moment questioning the desire on the part of du Pont to render a service to the Government in accepting this important contractual obligation, as many others, corporations and individuals, have done in other ways, nevertheless, it is most difficult to reason that this huge, profit-making corporation, obligated to its stockholders as it is, would, for the sum of one dollar ($1.00), work for a period, up to this time of ten (10) years for a mere, ten cents (10¢) a year. Of course, the termination date has not yet been reached or made public. Therefore, the ten cents (10¢) per year may well be reduced to one cent (1¢) a year. Judge Timmerman has treated this aspect fully and carefully (Jur. St. 50-53).

As a matter of fact, it has been conceded by appellees that du Pont sold to itself items of its own manufacture, at regular retail prices, up to a total value of one million three hundred seventy-nine thousand dollars ($1,379,000).

.00), an amount surely sufficient to denote a profit to du Pont (Tr. Vol. III, 13, 115, 131-132). Of course, appellees would minimize the importance of this but the inescapable fact remains that a profit was there beyond the mere one dollar ($1.00). It is a profit making undertaking.

Above and beyond the foregoing, is the fact that, despite du Pont's avowed lack of intention to devote its efforts to the atomic energy field, the fact remains that du Pont was selected for this very job because they were experts in this very thing. Certainly, an expert would want to improve its degree of expertness, to continue to train its new personnel in the activity in which it is recognized as expert. It can hardly be seen how such training of du Pont, entirely at government expense, could have been found not to be real consideration in itself. Once again, of course, the foregoing goes to the lack of reasonableness of the finding by the Court.

There being a use under the South Carolina Sales and Use Tax Act by du Pont of the tangible personal property in the carrying out of its contractual obligations (Jur. St. 66), coupled with a consideration flowing to du Pont as fully treated hereinabove, there is for application the principles laid down in the cases of *Detroit v. Murray Corporation of America and the United States of America*, 355 U. S. 489; *United States v. Township of Muskegon and Continental Motors*, 355 U. S. 484; and *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466, which upheld the right of the taxing authority to tax the user of government owned property, the tax being upon the user and not upon the United States.

IV

The Court below should have refused jurisdiction to enjoin the assessment and collection of the taxes.

Appellants respectfully submit that the Court below should have either denied jurisdiction or, in the alternative, should have retained jurisdiction pending determination by State Courts as to whether the recovery provisions of the South Carolina Sales and Use Tax Act (Jur. St. 71-72), which specific provisions have not been passed upon by the South Carolina Supreme Court, provide for interest on sales and use taxes paid under protest. The provisions of 28 U. S. C. 1341 deny to district courts the right to enjoin and restrain the levy and collection of any tax under state law where a plain, speedy and efficient remedy may be had in State Courts. The question then for the State Courts to determine is whether interest is provided under its statutes. If it is, then, under the numerous Federal decisions dealing therewith, the remedy is adequate. *Spector Motor Service v. O'Connor*, 340 U. S. 602; *Toomer v. Witsell*, 334 U. S. 385.

Appellees contend that the provisions of 28 U. S. C. 1341 do not operate to bar injunction where the Government is a party. However, it is submitted that facts make cases. Here, it is respectfully urged that it is not a matter of having to get a congressional appropriation with which to pay the taxes under protest.* Article XX of the definitive contract contains provisions with reference to payment under protest and details the contractual understanding thereabout.**

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* *City of Springfield v. United* (C. C. A. Mass., 1939), 99 F. (2d) 860, Cert. denied, 306 U. S. 650, 59 S. Ct. 592; *United States v. Rickert*, 188 U. S. 432, 444, 23 S. Ct. 478.

** (Exh. P-2, 42.)

District Judge Timmerman, in his dissenting opinion (Jur. St. 46-49), has set forth a clear treatment of the lack of jurisdiction of the Court below to issue injunction.

CONCLUSION

The case is within the appellate jurisdiction of the Court. It presents substantial federal questions requiring plenary hearing, questions in which there is considerable interest on the part of taxing authorities generally.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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